## INDEX TO APPENDIX

INDEX TO APPENDIX

Page

Docket Entries ..... App. p. 1

Complaint for Injunction and Declaratory Relief (Civil Rights) ..... 3

Motion for Temporary Restraining Order and Order to Show Cause ..... 10

Return to Order to Show Cause ..... 12

Petitioner's Testimony Dated March 8, 1972 ..... 18

Memorandum of Decision ..... 34

Opinion, Circuit Judge, Dissenting ..... 40

Answer ..... 41

Notice of Appeal to the Supreme Court of the United States ..... 44

IN THE

# Supreme Court of the United States

October Term, 1972
No. 71-1583

EDMUND G. BROWN, JR., Secretary of the State of California,

*Appellant,*

*vs.*

RAYMOND G. CHOTE,

*Appellee.*

Appeal From the United States District Court
Northern District of California

## APPENDIX.

IN THE

# Supreme Court of the United States

October Term, 1972

No. 71-1583

EDMUND G. BROWN, JR., Secretary of the State of California,

*Appellant,*

v.

RAYMOND G. CHOTE,

*Appellee.*

Appeal From the United States District Court
Northern District of California

## APPENDIX.

## DOCKET ENTRIES

Chote, Raymond G. Plaintiff vs. Brown, Edmund, Sec. State of Calif. Defendants.

Attorneys: Attorney General State of California, Room 500, Wells Fargo Bank Bldg., Fifth Street and Capitol Mall, Sacramento, CA 95814.

In Pro. Per. 628 Waverly St., Palo Alto, Ca. 94301.

Civil rights—filing fees.

Mar. 3:

1. Filed complaint, issued summons.
2. Filed affdt in forma pauperis
3. Filed ORD granting leave to proceed in forma pauperis
4. Filed OSC hrg. 3/8 4:00

Mar. 8:

5. Filed order convening 3 Judge Court, consisting of Judges Oliver D. Hamlin, CJ, Albert C. Wollanberg & William T. Sweigert, DJ's. (Richard H. Chambers, CJ).

Mar. 7:

6. Filed Notice of conveninf of 3 judge court.

Mar. 8:

ORD: after hrg before 3 judge court Pltf. Mo. for OSC for Prelim
Filed inj. stands submitted.

Mar. 8:

6-A. Return on Order to Show Cause by defendant.

Mar. 9:

7. Filed Memorandum of decision in favor of pltf. and preliminary injunction against the defendant.

Mar. 23:

8. Filed ANS of deft to comp.

Apr. 7:

9. Filed notice of appeal to Supreme Court of the United States by Deft Edmund G. Brown, Jr., Secretary of State of Calif.

Apr. 7:

Mailed Clerk's notice of filing Appeal to parties of record.

Apr. 13:

10. Filed designation of record by deft. requesting the entire record and the Reporter's Transcript.

Apr. 17:

11. Filed designation of record on appeal by Pltff.

Apr. 25:

12. Filed copy of letter to Raymond G. Chote from Carl R. Pline official Court Reporter dated April 25-72.

Apr. 25:

13. Filed Original & 1 copy of Court Reporter's Transcript of Mar 8-72.

Apr. 27:

Made, Mailed Record on Appeal to Supreme Court of the United States by Certified Mail Receipt No. 224334.

May 4:

14. Filed receipt for file from Supreme Court.

**Complaint for Injunctive and Declaratory Relief (Civil Rights)**

In the United States District Court, for the Northern District of California.

Raymond G. Chote, Plaintiff vs. Edmund G. Brown, Jr. Secretary of State of California, Defendant. C-72-380, WTS.

Filed: Mar. 3, 1972.

## I. JURISDICTION

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), and 28 U.S.C. § 1343(4). The amount in controversy in this action, exclusive of interests and costs, exceeds Ten Thousand Dollars ($10,000.00) for the plaintiff.

2. Declaratory judgments are authorized by 28 U.S.C. §§ 2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure.

3. This action is authorized by 42 U.S.C. § 1983, which provides redress for the deprivation under color of law of rights, privileges, and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

## II. PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all others similarly situated, seek to have this Court declare invalid, and enjoin the enforcement of California Election Code Secs. 6552 & 6553. These sections discriminatorily require the payment of filing fees by persons seeking to have their names placed upon the ballot as candidates for elective office. Enforcement of these sections by the defendant, Secretary of State of Califor-

nia, denies poor residents of California their right to run for public office and denies all residents of California their right to consider and vote for the candidates of their own choice. Such deprivations violate plaintiff's rights under the First Amendment and under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

2. This action also seeks a declaratory judgment declaring that the California Election Code Secs. 6552 & 6553 are unconstitutional, since they deny plaintiff and others similarly situated of their rights to run for elective office and to vote for the candidates of their own choice.

## III. PLAINTIFF

1. Plaintiff RAYMOND G. CHOTE and all others similarly situated are residents of the State of California who desire to be candidates for elective office in the June 6, 1972 primary election. Plaintiff CHOTE and all others similarly situated meet all the legal requirements for elective office except for their inability to pay filing fees, as a requirement of the California Election Code Secs. 6552 & 6553.

2. Plaintiff RAYMOND G. CHOTE and others similarly situated are—and/or represent—residents of the State of California, who are registered to vote in the June 6, 1972 primary election. Plaintiff CHOTE and all others similarly situated—are and/or represent—registered voters who desire to consider and vote for plaintiff CHOTE as candidate for Representative In Congress from the 17th Congressional District in California.

## IV. DEFENDANT

1. Defendant Edmund G. Brown, Jr., as Secretary of State of California is responsible for the administration, supervision, and enforcement of laws, regulations, and state constitutions provisions pertaining to elections in the State of California; his responsibilities include the duty to certify the names to be placed upon the ballot as candidates for elective office.

## V. BASIS OF CLASS ACTION

1. Plaintiff RAYMOND G. CHOTE brings this action pursuant Rule 23 of the Federal Rules of Civil Procedure on his own behalf and on behalf of all other residents of the State of California who desire to be candidates for elective office in the June 6, 1972 primary election and who meet all the legal requirements to have their names placed upon the ballot as candidates for elective office in the June 6, 1972 primary election except for their inability to pay filing fees, as required by Sections 6552 & 6553 of the California Election Code.

2. Plaintiff RAYMOND G. CHOTE and all others similarly situated bring this action as a class action for the following reasons: the questions of law and fact are common to the plaintiff and to the class he represents; the members of the class are so numerous as to make joinder impractical; the claims of the plaintiff are typical of the claims of all members of the class; the plaintiff fairly and adequately represents the claims of all members of the class; the defendant is acting on grounds generally applicable to the entire class; the questions of law and fact common to the class predominate over any questions affecting individual members; and a class action will best provide a fair and

efficient adjudication of the important issues at stake here.

## VI. STATEMENT OF THE CLAIM

1. Sections 6552 & 6553 of the California Election Code requires persons who seek to have their names placed upon the ballot as candidates for elective office to pay filing fees. These Sections require a fee of one percent or two percent of the annual salary of the office sought to be paid as a fee for filing as a candidate for that office.

2. Plaintiff RAYMOND G. CHOTE is 46 years old and has lived in the City of Palo Alto, County of Santa Clara in California since July of 1970. He is retired from the United States Navy Reserve as a Commander. His retirement is without pay.

3. On February 17, 1972 Plaintiff CHOTE was a registered voter in the County of Santa Clara and had been so registered for more than one year. On February 17, 1972 plaintiff CHOTE telephoned the Registrar of Voters in Santa Clara County and was advised that a fee of $425.00 must be paid in advance in order to receive the necessary sponsors certificates and other papers needed to be placed on the ballot of the primary election to be held June 6, 1972 for the office of Representative to Congress from the 17th District. Plaintiff CHOTE asked if the papers would be delivered in exchange for a worthless check and the answer was yes. Plaintiff CHOTE went the same day to the office of the Registrar of Voters in Santa Clara County and presented a check drawn in the amount of $425.00 payable to the Secretary of State of California. Across the face of the check was typed in "Written under protest for filing fee". The Registrar of Voters

said that the check will be given to the Secretary of State along with the completed papers required to place a name on the ballot. The Deputy Secretary of State, Richard Maullin, speaking for and with full knowledge of the Secretary of State of California informed the plaintiff CHOTE on March 1, 1972 that the Secretary of State will not allow plaintiff's name to be placed on the ballot if the check written for the filing fee is not honored at the bank. The check will not be honored since there is only a token amount in that account and the plaintiff has no expectations of having enough to pay the fee before the date of March 20, 1972 when the ballots go to the printers. March 10, 1972 is the closing date for filing and this may well be the date by which action should be taken by the COURT to avoid irreparable harm to the plaintiff CHOTE.

4. Plaintiff CHOTE meets all legal requirements to have his name placed on the ballot for the office of Representative In Congress from the 17th District of California except that he is unable to pay the filing fee of $425.00.

5. The application and enforcement of Section 6552 & 6553 of the California Election Code results in an invidious discrimination based solely upon the factor of wealth. It discriminates against many poor persons in California who may be qualified for and desirous of elective office, but who completely and effectively are denied the right to seek such positions because of their impoverished condition. Moreover there is no compelling of the State of California to require payment of a filing fee.

## VII. CAUSE OF ACTION

1. In a related case, WONG et al. vs. MIHALY C-71 1771 ACW of the UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA substantial cause for action was set forth and granted by Judge Wollenberg on September 17, 1972.

## VIII. BASIS FOR INJUNCTIVE RELIEF

1. Plaintiff and members of the class he represents will suffer irreparable injury if the relief sought by them is not granted, since they will continue to be denied their rights to equal protection and due process of laws, their rights to seek and be considered for elective public office, and their rights to vote for candidates of their choice.

2. No previous application for the relief sought herein has been made to this or any other court.

3. No adequate remedy at law is available to plaintiff or to any member of the class he represents.

## XI. BASIS FOR DECLARATORY RELIEF

An actual controversy has arisen and now exists between plaintiff and defendant, whereby plaintiff contends the California Election Code Sections 6552 & 6553 are unconstitutional and null and void insofar as filing fees are required, and defendant contends he will continue to enforce the requirement for filing fees. Plaintiff desires both a declaration that the requirement under California law that filing fees be paid is unconstitutional, null and void, and an injunction enjoining and restraining defendant from further enforcement of California Election Code Sections 6552 & 6553 insofar as they require a filing fee.

WHEREFORE; plaintiff respectfully prays on behalf of himself and all members of the class he represents that this COURT:

1. Issue a temporary restraining order enjoining and restraining defendant from refusing to list defendant on the ballot of the June 6, 1972 primary election to the office of Representative In Congress from the 17th District of the State of California soley for non-payment of the filing fee.

2. Issue a declaratory judgment declaring that Sections 6552 & 6553 insofar as they require payment of filing fees are unconstitutional and null and void.

3. Issue an order to the defendant to return the check written under protest for the filing fee to the plaintiff and bring no action against the plaintiff for writing said check.

4. Order the defendant to pay any costs of this proceeding.

5. Grant such other relief as the COURT deems appropriate.

RAYMOND G. CHOTE
628 Wavery Street
Palo Alto
California 94301
415 328-9428

**Motion for Temporary Restraining Order and Order to Show Cause**

In the United States District Court, for the Northern District of California.

Raymond G. Chote, Plaintiff vs. Edmund G. Brown, Jr. Secretary of State of California, Defendant. C-72-380, WTS.

Filed: Mar. 3, 1972.

Plaintiff hereby moves, because of the danger of immediate irreparable injury that might flow, for a Temporary Restraining Order and Order to Show Cause, as follows:

1. That defendant EDMUND G. BROWN, JR., Secretary of State of California, his successors in office, agents, and employees, and all other persons in active concert and participation with him, be restrained and enjoined from commencing the printing, dissemination, or publication of that part of the ballot for the June 6, 1972 primary election in the seventeenth Congressional District of the State of California which covers candidates for elective public office.

2. That defendant EDMUND G. BROWN, Jr., Secretary of State of California, his successors in office, agents, and employees, and all other persons in active concert and participation with him, be restrained and enjoined from refusing to accept, certify, and file declaration of candidacy from plaintiff RAYMOND G. CHOTE, and all others similarly situated, from refusing to hear and certify sponsors who appear before defendant EDMUND G. BROWN on behalf of plaintiff Raymond G. Chote, and all others similarly situated, and from refusing to take any other steps in furtherance of the desires of plaintiff RAYMOND G.

CHOTE, and all others similarly situated to seek elective public office.

3. It is ordered that

4. All pleadings, affidavits, and briefs in support of the application for Preliminary Injunction shall be served upon defendant on or before March 6, 1972, at 5:00 P.M.

5. That the defendant show cause before this Court, in courtroom 1, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, on March 8, 1972, at 4:00 P.M., why plaintiff's Motion for a Preliminary Injunction should not issue as prayed for in said Complaint.

6. That plaintiff's Motion for a Preliminary Injunction and all pleadings, affidavits, and briefs in support thereof shall be served upon defendant on or before March 6, 1972, at 5:00 P.M.

7. That defendant's opposition, counter-affidavits, and briefs be filed on or before March 8, 1972. [W.T. Sweigert U.S.D.C. March 3, 1972].

This Motion for Temporary Restraining Order and Order to Show Cause is made pursuant to Rule 65 of the Federal Rules of Civil Procedure and is based upon this Motion, and the Complaint for Injunctive and Declaratory Relief.

RAYMOND G. CHOTE
628 Waverly St.
Palo Alto, California, 94301
(Phone 415 328 0451)

**Return to Order to Show Cause**

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, v. Edmund G. Brown, Jr., Secretary of State of the State of California, Defendant. No. C-72-380.

Filed: Mar. 8, 1972.

COMES NOW THE DEFENDANT EDMUND G. BROWN, JR. and in return to the order to show cause heretofore issued in the above entitled matters files this opposition to the granting of a preliminary injunction.

This opposition will be based upon the papers and files in this matter on file in the above entitled court; this return and the points and authorities, exhibits and affidavits in support thereof.

Defendant Edmund G. Brown, Jr. opposes the issuance of a preliminary injunction on the following grounds;

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Plaintiff has stated no facts entitling him to relief as the proponent of a class action.

3. Plaintiff has stated no facts entitling him to declaratory relief.

4. Plaintiff is seeking equitable relief from this court with unclean hands.

Respectfully submitted,
EVELLE J. YOUNGER
Attorney General
ROBERT BURTON
Assistant Attorney General
J. M. SANDERSON
Deputy Attorney General
Attorneys for Defendant

## POINTS AND AUTHORITIES

### PRELIMINARY STATEMENT

Plaintiff in this case apparently is seeking to challenge the constitutionality of the statutes in the California Elections Code which requires a filing fee in order to run for the office of Member of the House of Representatives.

He has affirmatively pleaded that he has issued a check payable to the Secretary of State of the State of California with insufficient funds in the bank to pay said check. On the basis of this check plaintiff has received his nominating papers from the County Clerk of Santa Clara County. As of this date plaintiff has not returned said nominating papers with sufficient signatures to qualify him as a candidate to the County Clerk of Santa Clara County.

The shortness of time allowed for defendant to make this return prevents him from preparing complete points and authorities. In this regard and in support of the validity of the filing fees required by California statute defendant has attached hereto as Exhibit A and is incorporating said Exhibit A by reference as though fully set forth herein points and authorities which were prepared for and filed in a similar case in the Superior Court of the State of California for the County of Los Angeles.

### I

### PLAINTIFF DOES NOT SET FORTH SUFFICIENT GROUNDS TO BRING THIS ACTION AS A CLASS ACTION

There are no allegations that any other person has ever been refused the right to run for office because he was unable to pay a filing fee nor that anyone has sought to run for office without paying a filing fee.

The federal rules of civil procedure require that members of the class be notified by the court in the event a class action is being prosecuted so that they may join in the action as they choose. There is no practical way for the court, in this instance, to notify members of a class which is not defined. Indeed, there is no showing that any such class exists at all. Therefore, this matter should not be tried as a class action but only as an action on behalf of plaintiff. *DeBremaecker v. Short*, 433 F.2d 733, 734 (1970); *Committee To Free The Fort Dix 38 v. Collins*, 429 F.2d 807, 812 (1970). Further, plaintiff has not established that he can adequately represent a class. *Anderson v. Moorer*, 372 F.2d 747, 751 (1967).

## II

## THERE EXISTS NO CONTROVERSY BETWEEN THE PLAINTIFF AND THE DEFENDANT ENTITLING PLAINTIFF TO DECLARATORY RELIEF

Plaintiff alleges that he contends Elections Code sections 6552 and 6553 are unconstitutional and that defendant contends that said sections are constitutional.

While this is apparently so it does not rise to the dignity of a judicial controversy litigable in this court. Plaintiff has alleged that he has received his nominating papers from the County Clerk of Santa Clara County. He has not alleged that he has been refused the right to file such papers. Until such time as such refusal is made there exists no judicial controversy between plaintiff and defendant.

## III

## PLAINTIFF APPROACHES THIS COURT WITH UNCLEAN HANDS

Plaintiff has alleged in his complaint that he presented a check to the Registrar of Voters in Santa Clara County payable to the Secretary of State of California in the amount of $425. He has further alleged that there is only a token amount in the bank account upon which the check is written and that he has no intention of increasing the amount in that bank account so that the check may be honored when presented for payment. California Penal Code section 476(a) provides in part as follows:

> "Any person who for himself . . . wilfully, with intent to defraud makes or draws . . . any check . . . upon any bank . . . for the payment of money, knowing at the time of such making, . . . that the maker . . . has not sufficient funds in, or credit with said bank . . . for the payment of such check . . . in full upon the presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the County Jail for not more than one year, or in the State Prison for not more than 14 years."

It thus appears that plaintiff has affirmatively alleged the commission of a felony in order to obtain nomination papers to seek office as a member of the House of Representatives. Plaintiff thus approaches this court seeking equitable relief with unclean hands.

As stated in *Precision Inst. Mfg. Co. v. Automotive M. M. Co.*, 324 U.S. 806, 814-815 (1945):

> "The guiding doctrine is this case is the equitable maxim that 'he who comes into equity must

come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court in equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abetter of iniquity.' [Citations.] Thus while 'equity does not demand that its suitors shall have led blameless lives,' [citations] as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. [Citations.]

". . . Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

"Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. . . . [Citations.]"

## CONCLUSION

For the foregoing reasons defendant specifically requests that a preliminary injunction be denied.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

ROBERT BURTON
Assistant Attorney General

J. M. SANDERSON
Deputy Attorney General

Attorneys for Defendant

In the United States District Court, Northern District of California.

BEFORE:

HON. OLIVER D. HAMLIN, JR., CIRCUIT JUDGE

HON. ALBERT C. WOLLENBERG, DISTRICT JUDGE

HON. WILLIAM T. SWEIGERT, DISTRICT JUDGE

Raymond G. Chote, Plaintiff, vs. Edmund G. Brown Jr., Secretary of State of California, Defendant. No. Civil 72-380-WTS.

REPORTER'S TRANSCRIPT

MARCH 8, 1972

WEDNESDAY

REPORTED BY:
CARL PLINE

MARCH 8, 1972

THE COURT CRIER: The United States District Court for the Northern District of California, sitting as a Three-Judge Court, is now in session, composed of the Honorable Oliver D. Hamlin, Circuit Judge; Honorable Albert C. Wollenberg, District Judge; and Honorable William T. Sweigert, District Judge.

JUDGE SWEIGERT: All right.

THE COURT CRIER: Be seated, please.

THE CLERK: Civil action 72-380, Raymond Chote vs. Edmund G. Brown, Jr., Secretary of State of California, hearing an order to show cause why preliminary injunction should not issue.

Will counsel please state their appearances for the record?

JUDGE SWEIGERT: Mr. Chote—

MR. CHOTE: Yes, sir.

JUDGE SWEIGERT: —you have no attorney, have you?

MR. CHOTE: That's right, sir.

JUDGE SWIGERT: So you are appearing for yourself in this matter?

MR. CHOTE: Yes, sir.

JUDGE SWEIGERT: All right.

And then we have the appearance of Mr. Chote, the plaintiff; and for the defendant is Mr. Sanderson, I take it. [3]

MR. SANDERSON: Yes, Your Honor. James M. Sanderson, Deputy Attorney General.

JUDGE SWEIGERT: Attorney General's office.

And are you ready to proceed now, Mr. Chote?

MR. CHOTE: Yes, sir.

JUDGE SWEIGERT: Did you wish to make any presentation beyond what you have in your papers? Or, I could suggest to you—I could suggest to you that it might be well to let the Attorney General proceed and see what, if any, opposition he is going to raise to your petition. Then you could speak to us after he finishes if that is agreeable with you. Generally—

MR. CHOTE: Yes, sir, that is. I have no objection, and I appreciate the suggestion.

JUDGE SWEIGERT: All right, sir.

Plaintiff seems willing to have you tell us, Mr. Sanderson, what you think is wrong with this application, if there is anything wrong with it.

JUDGE WOLLENBERG: May I suggest that the Attorney General has filed a return with copious points and authorities and attachments thereto, and it may be that it is not necessary to repeat this long, full return.

JUDGE SWEIGERT: Well, I'm quite sure of that. I would simply say this: That due to the shortness of the time the return was not filed until today—[4]

MR. SANDERSON: That's correct.

JUDGE SWEIGERT: —and we have not had an opportunity to go over the State's return.

Now, let me ask you: Have you got everything in this answer or return that you think should be in it, together with all your points and authorities and reasons?

MR. SANDERSON: I have everything in it, Your Honor, except an answer to the complaint. I did not file an answer in return.

JUDGE WOLLENBERG: That is right.

JUDGE SWEIGERT: That is all right.

Are we to consider that the allegations of the complaint are to be taken as true?

MR. SANDERSON: No, Your Honor. I would ask leave to file an answer, and deny some of the allegations in the complaint at least.

JUDGE SWEIGERT: What matters of fact are in issue, if any?

MR. SANDERSON: Well, let me look at the complaint, if I may, Your Honor.

JUDGE SWEIGERT: Yes.

MR. SANDERSON: The first matter of fact, I think, in issue, Your Honor, is the plaintiff's indigency.

JUDGE SWEIGERT: The plaintiff's what?

MR. SANDERSON: Indigency, or alleged lack of assets [5] in order to file a—to pay the filing fee.

JUDGE SWEIGERT: All right. He alleges he is indigent—

MR. SANDERSON: He alleges that he does—we have no information or belief regarding that, and un-

der the Code of Civil Procedure we would deny it on that basis.

JUDGE SWEIGERT: All right; that is fine.

What other factual matters do you consider as an issue?

MR. SANDERSON: Well, the basis for declaratory relief, Your Honor. We don't feel that there is a controversy—this is set forth in my points and authorities, however. It is covered in that.

JUDGE WOLLENBERG: Yes.

JUDGE SWEIGERT: Well, I know, but what real factual allegations are to be—

MR. SANDERSON: Well, the one factual allegation that he makes that I do take issue with is that he has met all of the legal requirements to have his name placed on the ballot for the office of Representative of Congress.

JUDGE SWEIGERT: Well, I know; but that is a conclusion anyhow.

Any order of this Court would have a qualification that he be otherwise qualified.

MR. SANDERSON: Well, I filed an affidavit with [6] regard to that, Your Honor, and it is on Exhibit No. C, in which it is noted that he has not returned —although he has taken out his nomination papers, he has not returned them to the County Clerk. And unless he returns these papers, of course, he is not qualified, regardless of anything.

And in that situation I don't think it is proper for a—

JUDGE SWEIGERT: In other words, you are—

MR. SANDERSON: —preliminary injunction issue.

JUDGE SWEIGERT: Just a moment. You are raising a question with respect to what? The time that he . . .

MR. SANDERSON: He has not done everything necessary to be a candidate for the Congress of the United States, Your Honor; that is what I am saying. And he is asking to be put on the ballot, even though he has not complied with the statutory laws of the State of California, Your Honor.

JUDGE SWEIGERT: Well, in what respect has he not otherwise—

MR. SANDERSON: He has not filed his nominating papers with sponsors.

JUDGE WOLLENBERG: Yes.

MR. CHOTE: Your Honor, I have the papers here with the sponsors—

JUDGE SWEIGERT: Just a moment.

JUDGE WOLLENBERG: This isn't the Registrar's Office. [7]

JUDGE SWEIGERT: No, it is not.

The statute says that the fee should be paid to the County Clerk at the time the forms for nomination are obtained.

MR. SANDERSON: That's correct, Your Honor.

JUDGE SWEIGERT: And he shall not accept any papers unless the fees are paid at the time.

MR. SANDERSON: That's correct, Your Honor.

JUDGE SWEIGERT: All right.

And you are saying that he has not—he has not attempted to obtain the forms of nomination?

MR. SANDERSON: No. No, no.

He has obtained the nomination forms.

He alleges in his complaint—

JUDGE SWEIGERT: You admit that he has obtained the nomination forms?

MR. SANDERSON: That's correct.

JUDGE SWEIGERT: All right. And the statute says that the fee required to be paid to the Secretary of State shall be paid to the County Clerk at the time the forms for nomination are obtained.

MR. SANDERSON: Yes, Your Honor.

JUDGE WOLLENBERG: The complaint alleges, Judge Sweigert, that he has the forms and that he gave a check, and the check—at the time he gave it he stated he didn't [8] have the money; the check was no good. He told—

JUDGE SWEIGERT: Yes.

JUDGE WOLLENBERG: —the Registrar that.

I mean, that is in the plaintiff's pleadings as a fact, you see.

JUDGE SWEIGERT: Well, I know; but—

JUDGE WOLLENBERG: Yes. I mean I thought that you didn't know that.

JUDGE SWEIGERT: He alleges that in effect that he is unable to pay the fee, and that the County Clerk told him that he would have to pay the fee in advance.

That raises the issue, doesn't it?

MR. SANDERSON: Well, there is a further issue, Your Honor. And that is he alleges that he gave a check without funds in the bank so that the check could be honored to the Clerk.

JUDGE SWEIGERT: Yes.

MR. SANDERSON: Also in Exhibit No. C, which I have filed here, is an affidavit of the Clerk, disputing the fact that he or anyone in his office ever told him that he would issue nomination papers for a worthless check.

The complaint alleges that the check had noted across it "under protest" but it doesn't say "under

protest and without funds". And there is a considerable difference.

JUDGE WOLLENBERG: We are not trying any criminal [9] case here, so—

JUDGE SWEIGERT: All right.

MR. SANDERSON: Well, I raise that in—

JUDGE WOLLENBERG: —in this particular matter whether that is an essential issue—

MR. SANDERSON: Well, I raise that in regard to the defense that he lacks clean hands before this Court, Your Honor.

JUDGE SWEIGERT: All right.

Anything else in the facts disputed?

Go ahead.

MR. SANDERSON: No, I don't think so, Your Honor.

JUDGE SWEIGERT: All right. What is the position of the Attorney General with respect to the merits of the case, the real issue; that is, whether or not these two Sections of the Code are valid?

MR. SANDERSON: Well, it is our position, Your Honor, that they are valid. And in Exhibit No. A to the return we have attached points and authorities—

JUDGE SWEIGERT: Yes.

MR. SANDERSON: —which were filed in the Superior Court of the State of California for Los Angeles County in another case, but with similar issues.

JUDGE SWEIGERT: Superior Court, Los Angeles.

MR. SANDERSON: Yes, Your Honor. [10]

They were filed on March 1st, of this year.

JUDGE SWEIGERT: Yes.

MR. SANDERSON: And due to the shortness of time I simply incorporated them in here.

JUDGE SWEIGERT: Yes.

MR. SANDERSON: Now, it is our position through these points and authorities, that due to the case of Bullock vs. Carter, which is the United States Supreme Court—which came down on February 24th,—that reasonable filing fees are valid, and that the California filing fees are reasonable.

It is set forth in the points and authorities, Your Honor.

JUDGE SWEIGERT: Is that the way you construe the Bullock case? That the only question is whether or not the amount of the fee is reasonable?

MR. SANDERSON: If there is some rational basis for having the fee, Your Honor; and I think that has been shown in California and in other States, and recognized by the Courts that the limitation of people on the—the number of persons to be placed on the ballot is a rational consideration to take into account.

If the fees are reasonable, then this result—then the fees are valid. And I think that is the import of the Bullock case; yes. [11]

JUDGE SWEIGERT: All right. Is there anything else you wish to present?

MR. SANDERSON: No, Your Honor. I will submit it on my points and authorities, and what I have said here.

JUDGE SWEIGERT: All right.

Do you want to hear further argument?

JUDGE WOLLENBERG: You promised the gentleman he could respond—

JUDGE SWEIGERT: He is responding now. He says he is willing to submit it—

JUDGE WOLLENBERG: No, no.

You told the plaintiff that he could respond.

JUDGE SWEIGERT: Yes. We are going to hear from the plaintiff.

JUDGE WOLLENBERG: No, I have nothing.

JUDGE SWEIGERT: Did you want to hear anything further from the State?

JUDGE HAMLIN: No.

JUDGE SWEIGERT: All right. Then we look to your points and authorities, and whatever is in the record.

MR. SANDERSON: All right, Your Honor.

May I say one other thing?

JUDGE SWEIGERT: Yes.

MR. SANDERSON: —so that the record will show it? I filed the return today, and I served Mr. Chote at [12] approximately 1:30 in the Courtroom, here, with these points and authorities. I was unable to serve him prior to this time due to the shortness of time.

JUDGE SWEIGERT: Yes.

MR. SANDERSON: Thank you.

JUDGE SWEIGERT: All right, Mr. Sanderson.

Mr. Chote, is there anything that you want to present to us?

MR. CHOTE: Yes, sir.

On the point of indigency, I don't know whether—or what you want in proof.

At the time I needed to take out the papers, in a timely fashion, I in fact did not have the $425; and I don't have it now; and I don't expect that I will have it by the time it would be due—this check would be cashed.

JUDGE WOLLENBERT: May I ask you, Mr. Chote—

MR. CHOTE: Yes, sir.

JUDGE WOLLENBERG: —did you file with this Court any affidavit showing that you have no—not only $425, but no means of obtaining the same?

MR. CHOTE: Yes, I did—

JUDGE WOLLENBERG: Is that on file?

MR. CHOTE: —and Judge Schnacke approved a request of mine to proceed in forma pauperis.

JUDGE WOLLENBERG: That is his form to proceed in [13] forma pauperis.

JUDGE SWEIGERT: Yes. He is proceeding in forma pauperis.

JUDGE WOLLENBERG: Yes.

JUDGE SWEIGERT: And he alleges that he is unable to pay the $425 fee.

JUDGE WOLLENBERG: Yes.

JUDGE SWEIGERT: But you would have in mind that whatever this Court did it might impose a condition to the effect that you would have to file with the Registrar, or County Clerk, some kind of an affidavit, or the equivalent, under oath, that you did not have funds or property that would enable you to pay this $425.

MR. CHOTE: Yes.

JUDGE SWEIGERT: You have that in mind as a possibility?

MR. CHOTE: Yes, sir. And I could do that in good conscience.

JUDGE SWEIGERT: I see.

MR. CHOTE: Unfortunately, I not only don't have any money; I'm in the hole to some extent.

So from my point of view that isn't something that would deter me from continuing this request for relief.

JUDGE SWEIGERT: Whatever happened to the check that you were talking about with the County Clerk? Did you leave [14] it with them or not?

MR. CHOTE: Yes, sir.

JUDGE SWEIGERT: You actually left it with them.

MR. CHOTE: Mr. Mann's secretary has it in her deck, and they said at the time—

JUDGE HAMLIN: Has it been sent to a bank?

MR. CHOTE: No, it has not. At the time—

JUDGE SWEIGERT: You admit that it will not be paid?

MR. CHOTE: Yes, that's correct.

JUDGE SWEIGERT: And you told that to the Registrar?

MR. CHOTE: Yes.

JUDGE HAMLIN: What bank is it on?

MR. CHOTE: It is on the Liberty Bank, sir, in Los Altos.

JUDGE HAMLIN: And how much money do you have in that bank?

MR. CHOTE: About $2.00.

JUDGE WOLLENBERG: And that was so when you wrote the check?

MR. CHOTE: Yes, sir. I have purposely not attempted to—

JUDGE WOLLENBERG: What more is there to do in this case?

JUDGE SWEIGERT: What? [15]

JUDGE WOLLENBERG: What more is there to do in this case?

JUDGE SWEIGERT: What do you suggest?

JUDGE WOLLENBERG: Well, is there something else you want to say?

MR. CHOTE: Yes, sir. There are some other things.

JUDGE WOLLENBERG: All right.

MR. CHOTE: In the—according to the legal requirements, March 10th is the date in which—they have as a deadline for accepting the filings of sponsors.

JUDGE SWEIGERT: Yes.

MR. CHOTE: I have brought with me into the Court sponsor certificates with more than the 40 numbers of signatures required already on them. And I have reason to believe they are all good signatures; most of them were taken from records of the Registrar.

JUDGE SWEIGERT: Yes. And the statute says that the County Clerk will not accept any papers unless the fees are paid at the time.

And they were—the fee was supposed to be paid at the time the forms for nomination were obtained.

JUDGE WOLLENBERG: Well, I think you will find that the Opinion of the Attorney General is contrary to that.

Isn't that correct, Mr. Sanderson?

MR. SANDERSON: What, Your Honor? [16]

JUDGE WOLLENBERG: It is the Opinion of the Attorney General that the forms may be given out prior to the payment of the money.

MR. SANDERSON: I am not aware of any such opinion, Your Honor.

JUDGE SWEIGERT: Well, it says—

JUDGE WOLLENBERG: Well, that is not so.

That is, 7 Ops. Atty. Gen. 119.

MR. CHOTE: Mr. Mann, the Registrar, said the only way that he would give them to me, me not having money, would be for me to give him a check which he would pass on along with the papers to the Secretary of State. And it would be the Secretary of State

who would determine then if there was no money available for this.

And I wrote across the face of the check "written under protest for filing fee."

JUDGE SWEIGERT: Now, wait a minute.

That wouldn't necessarily show that the check wouldn't be paid.

But you do allege in your complaint that you are unable; and I take it to mean that you haven't got $425—

MR. CHOTE: That's correct.

JUDGE SWEIGERT: —in the Liberty Bank or otherwise.

MR. CHOTE: That's right. [17]

JUDGE SWEIGERT: All right.

Anything further that you think we ought to hear?

MR. CHOTE: Yes.

As far as the fee being reasonable, and the presentation of the Attorney General, I would like to have the Court note that in the case of Wong, et al. vs. Mihaly, last September in this Court, there was a judgment written by Judge Wollenberg—

JUDGE SWEIGERT: I think you need not go into that, because Judge Wollenberg is here, and we have his opinion.

MR. CHOTE: Yes, sir. I understand.

JUDGE WOLLENBERG: There is also one—I think Judge Hamlin has there—a Three Judge Court in Los Angeles, that you might give him the citation of. Judge Ely wrote an opinion just the other way—

JUDGE HAMLIN: Are you familiar with that, counsel?

MR. SANDERSON: Is that the Haag case, Your Honor?

JUDGE HAMLIN: Haag vs. State of California.

MR. SANDERSON: Yes, Your Honor. It is cited in my points and authorities.

JUDGE WOLLENBERG: Yes.

MR. SANDERSON: It is cited in the points and authorities that I filed—

JUDGE HAMLIN: Is it? Okay. [18]

JUDGE SWEIGERT: All right.

MR. CHOTE: Judge Sweigert, I would like to say one additional thing if I may.

JUDGE SWEIGERT: Yes.

MR. CHOTE: The Attorney General says that I come to the Court with unclean hands.

I deny this. I believe that I came here with a great deal of difficulty, and certainly not with unclean hands. And I did not attempt to hide anything, or do anything illegal.

JUDGE SWEIGERT: Yes. All right, sir, Fine.

Did you—normally, you would have a reply to the plaintiff. Would you want to add anything before we closed?

MR. SANDERSON: I just want to add one thing, Your Honor, I forgot.

We also take issue with the fact that Mr. Chote represents a class. He hasn't pleaded sufficient facts to indicate that a class exists, or that he could successfully represent it.

That is also covered in the points and authorities—

JUDGE WOLLENBERG: It is.

MR. SANDERSON: —but I wanted to indicate it as a dispute as far as the facts are concerned.

JUDGE SWEIGERT: All right, we have that in mind. [19]

MR. CHOTE: May I answer, that, sir?

JUDGE SWEIGERT: If you wish, briefly.

MR. CHOTE: In the related case I mentioned, this identification of class was an item; and I didn't think it necessary to put it in this case.

JUDGE SWEIGERT: Yes. You mean in the Judge Wollenberg case.

JUDGE WOLLENBERG: In the Wong case?

MR. CHOTE: Yes, sir.

There are other people who don't have the filing fee, essentially.

JUDGE SWEIGERT: Yes.

JUDGE WOLLENBERG: A lot of people don't have filing fees, but wrote checks.

I don't know if there is a class in that fact, is there?

MR. CHOTE: If there is a point that I should respond to, I will; in that when I went to get these papers, and the time was short to get the signatures, Mr. Mann, the Registrar of Voters, told me that he simply would not give me these papers that I would need, without paying the filing fee.

And I asked him if I could pay it with a worthless check; and he said, "Yes." So I did; and I gave it to him.

JUDGE WOLLENBERG: Yes. [20]

JUDGE SWEIGERT: But you did tell him at the time, in effect, that the check was worthless?

MR. CHOTE: Yes, sir. I wrote, as I say, on the front of it.

JUDGE SWEIGERT: We will consider that. We accept this all in your complaint.

All right. If that is satisfactory, we will submit the matter?

MR. SANDERSON: Yes, sir.

MR. CHOTE: Yes, sir, unless you have some advice for me.

JUDGE SWEIGERT: Submitted.

MR. CHOTE: I don't know of anything else—

JUDGE SWEIGERT: No, we are looking for advice today, not giving it.

MR. CHOTE: Yes. Well, you were kind enough to give me some, and I thought maybe you would give me more.

JUDGE SWEIGERT: Is there any way we can help you, though? You are without an attorney.

MR. CHOTE: Well, if I'm leaving something vital out of this—if it is apparent to all of you, but not me, I would appreciate knowing it so I can perhaps respond.

JUDGE SWEIGERT: Well, there is nothing that I have to offer to you at this moment.

MR. CHOTE: Thank you. [21]

JUDGE SWEIGERT: Thank you.

JUDGE WOLLENBERG: Thank you.

COURT CRIER: Court will not stand in recess.

(Whereupon the hearing recessed at 1:55 p.m.) [22]

**Memorandum of Decision**

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, vs. Edmund G. Brown, Jr., Secretary of State of California, Defendant. No. 72380.

Filed: Mar. 9, 1972.

Before: HAMLIN,* Circuit Judge, WOLLENBERG and SWEIGERT, District Judges.

Plaintiff alleges in effect that he has been advised by the Registrar of Voters of Santa Clara County that a fee of $425 must be paid in advance to entitle plaintiff to a place on the ballot for the June 6th primary election for the office of Representative to Congress from the 17th District; that plaintiff is financially unable to pay that fee and that March 10th is the closing date for filing.

California Elections Code, Section 6552 provides that the fee payable to the Secretary of State for filing a declaration of candidacy for the office of Representative in Congress shall be one percent (1%) of the first year's salary for that office, i.e., $425.

Section 6553 provides that the filing fee required to be paid to the Secretary of State shall be paid to the County Clerk at the time the forms for nomination are obtained; that the County Clerk shall not accept any papers unless the fees are paid at the time; that the County Clerk shall transmit the fees to the Secretary of State at the time he delivers the declaration of filing.

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*Judge Hamlin dissents.

Plaintiff, contending that these statutes are unconstitutional and in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, asks for a declaratory judgment and a preliminary injunction.

The suit is brought under the Civil Rights Act, Title 42 U.S.C. Section 1983. The Court accepts jurisdiction under 28 U.S.C. Section 1343(3) and, sitting as a court of three judges as required by 28 U.S.C. Section 2281, has heard plaintiff's application for preliminary injunction and the State's opposition thereto.

It has already been held in this district that a provision of the Charter of the City and County of San Francisco, requiring prepayment of a $175 filing fee as a condition for placement of a candidate's name on the ballot for the office of Supervisor, is a discrimination against those who are unable to pay the fee and a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. *Kim Wong v. Mihaly*, 332 F.Supp. 165 (N.D. Calif. 1971).

That decision, after consideration of conflicting decisions among other districts, cited and relied upon a series of cases holding in effect that a law prohibiting candidates from getting their names on the ballot solely because they cannot post a certain amount of money is unconstitutional as a deprival of equal protection of law; that such a statute can stand only when there is some alternative method whereby a candidate who is unable to pay the filing fee, can get on the ballot either by nominating petition, primary election or pauper's affidavit. *Georgia Socialist Workers Party v. Fortson*, 315 F.Supp. 1035 (N.D.Ga. 1970); *Jenness v.*

*Little*, 306 F.Supp. 925 (N.D.Ga. 1969)[1] and, specifically, upon *Carter v. Dies*, 321 F.Supp. 1358 (N.D. Tex. 1970), which has been recently affirmed by the Supreme Court of the United States in *Bullock v. Carter*, ....U.S. .... (2/24/72).

Our pending case is the first to arise since the Supreme Court has spoken and, of course, that decision is controlling here.

In *Bullock*, the Supreme Court considered a Texas primary election statute which set up a system of filing fees for various offices.[2] The Court (p. 15) although recognizing the validity of "reasonable candidate filing fees and licensing fees in other contexts," concludes that by requiring a candidate to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot is to erect a system which utilizes the criterion of ability to pay as a condition to

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[1] In *Haag v. State*, Central District, California, No. 70-426-R, 3/18/70, a three judge District Court denied preliminary injunction in a comparable case wherein various Peace and Freedom Party members sought placement on the ballot for the primary election of June 2, 1970. However, the ground for denial seems to have been that the plaintiffs "had available to them as an alternative at this posture of these proceedings, the ability to seek nomination of their party without paying any filing fee, since the statute under attack prohibits only the qualification of candidates for the general election upon non-payment of the required fee 5 days prior to the primary election." See order of 3/18/70. Further, it is to be noted that Circuit Judge Hly was quoted in the order as dissenting and as entertaining the view that "to condition the candidacy for public office for otherwise qualified citizens upon their financial ability to pay a fee not specifically related to the cost of the present elective process is invidiously discriminatory and not justified by any compelling interest of the State of California."

[2] Under the Texas election filing fee system, which was struck down as a whole, the fees ranged from $150 (less than the amount here involved) to as high as $8,900.

getting on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice."

The Supreme Court, although recognizing (p. 13) that the state has a legitimate interest in using filing fees to relieve the state treasury of the cost of conducting primary elections, concludes that "there must be a showing of necessity."

In the present case no showing has been made by the state that covering the costs of elections is even the purpose of the statutory filing fee here in question. On the contrary, the statute ties the filing fee, not to election costs or costs of the filing process, but arbitrarily to the salary of the office sought. Further, even if such were the state purpose, the Supreme Court (p. 14) indicates that, when it is speaking of "reasonable" candidate filing fees, it has in mind merely filing fees sufficient "to cover the cost of filing, that is, the cost of placing a particular document on the public record." No showing has been made that such is either the purpose or extent of the filing fee here in question.

The Supreme Court, although recognizing the state has a legitimate interest in regulating the number of candidates on the ballot to prevent the overcrowding of the ballot, the clogging of its election machinery and voter confusion, concludes (p. 11) that "a state cannot achieve its objectives by totally arbitrary means" and that if the state's purpose is to weed out spurious candidates, "other means to protect those valid interests are available."

Further, the Supreme Court pointed out (p. 2) that under the Texas primary election law "There is no alternative procedure by which a potential candidate, who is unable to pay the fee, can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office."

In our pending case California law makes no provision for any such alternative method by which an indigent candidate can get himself on the ballot.

That the burden is upon the state, not the plaintiff, to establish the requisite justification for its filing fee system, has been clearly indicated by the Supreme Court (p. 15); further, it has held that filing fee laws must be tested, not merely by the "rational basis rule" but by the strict standard of review set by *Harper v. Virginia*, 383 U.S. 663 (1966), i.e., it "must be closely scrutinized and found reasonably necessary to the accomplishment of state objective in order to pass constitutional muster," . . . "there must be a showing of necessity." (pp. 10, 13).

Since no such showing has been made by the State, concerning either the necessity, the purpose or the reasonableness of the filing fee statutes in question, we conclude that within the rationale and holding of *Bullock, supra*, plaintiff may prevail on the merits and that, absent a preliminary injunction, his constitutional right may be irreparably lost.

It is, therefore, ordered and decreed that defendant, Secretary of State of California, his successor in office or agents or employees and all other persons in active concert or participation with him, including County Clerks or Registrars of Voters charged by Section

6553 with the collection of election filing fees, be and they are hereby preliminarily enjoined from enforcing, following or applying, either directly or indirectly as to plaintiff, Raymond G. Chote, the provisions of said California Elections Code Sections 6552 or 6553, provided, however, that this order shall be applicable only if (1) said plaintiff is otherwise eligible under the State or other applicable election laws, and (2) said plaintiff files with defendant, Secretary of State, or the proper County Clerk or Registrar of Voters, an affidavit that he has no property or money from which to pay the said required filing fee and is, therefore, financially unable to pay the same.

This preliminary injunction, and the terms and conditions thereof, shall apply also to persons represented as a class in this action by plaintiff, to wit, persons in substantially the same position as plaintiff herein, and (1) who are otherwise eligible under the state or other applicable election laws, and (2) who file with defendant, Secretary of State, or the proper County Clerk or Registrar of Voters, an affidavit that he has no property or money from which to pay the said required filing fee and is, therefore, financially unable to pay the same.

Dated: March 9, 1972.

ALBERT C. WOLLENBERG
United States District Judge
W. T. SWEIGERT,
United States District Judge

HAMLIN, Circuit Judge, Dissenting:

In *Bullock v. Carter*, No. 70 128, February 24, 1972, the United States Supreme Court in discussing such a question in reference to filing fees in Texas said: "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." It has not been shown in this case that the filing fee complained of is not reasonable.

Accordingly, applicant's request for injunctive relief and a declaration that Sections 6552 and 6553 are unconstitutional should be denied.

Dated: March 9, 1972.

/s/ ILLEGIBLE
United States Circuit Judge

**Answer**

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, v. Edmund G. Brown, Jr., Secretary of State of California, Defendant. No. C-72-380-WTS.

Filed: Mar. 23, 1972.

Comes now the defendant, Edmund G. Brown, Jr., Secretary of State of California, and in answer to the complaint in the above entitled case, admits, denies and alleges as follows:

I

In answer to paragraph II of the complaint, defendant Edmund G. Brown, Jr. denies each and every, generally and specifically, all and singular, the allegations contained therein.

II

In answer to paragraph III of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations therein, and based upon such lack of knowledge or information denies each and every, all and singular, generally and specifically, the allegations contained in paragraph III of the complaint.

III

In answer to paragraph V of the complaint defendant, Edmund G. Brown, Jr., is without knowledge or information sufficient to form a belief as to the truth of the averments therein, and based upon the lack of such knowledge or information, denies each and every, generally and specifically, all and singular the allegations contained in paragraph V of the complaint.

IV

In answer to paragraph VI, subdivisions 2, 3 and 4 of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the averments therein, and based upon said lack of knowledge or information, denies generally and specifically, each and every, all and singular, the averments contained therein. In answer to subdivision 5 of paragraph VI, defendant denies generally and specifically, each and every, all and singular, the averments contained therein.

V

In answer to paragraph VIII of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the averment that no previous application for the relief sought herein has been made to this or any other court, and based upon such lack of knowledge or information, denies that averment. In answer to the remainder of paragraph VIII, defendant denies generally and specifically, all and singular, each and every, allegation contained therein.

AS A SEPARATE AND AFFIRMATIVE DEFENSE defendant, Edmund G. Brown, Jr., Secretary of State of the State of California, alleges that the filing fees and other requirements contained in California Elections Code, sections 6552 and 6553 are reasonable and necessary for the conduct of orderly elections in the State of California. Most of the votes cast in the State of California are upon either voting machines or other types of mechanical devices. Without a limitation upon the number of candidates running for offices, these voting machines and other mechanical

devices would not function properly and the election processes could not proceed in an orderly fashion. The filing fees further serve to offset a portion of the cost of placing the candidate's name on the ballot.

WHEREFORE, defendant Edmund G. Brown, Jr. respectfully prays as follows:

1. That the preliminary injunction heretofore issued in this matter be vacated, and that a permanent injunction be denied and the complaint dismissed.

2. For costs and for such other and further relief as the court may deem proper.

Dated: March 22, 1972.

EVELLE J. YOUNGER
Attorney General

ROBERT BURTON
Assistant Attorney General

J. M. SANDERSON
Deputy Attorney General

Attorneys for Defendant

**Notice of Appeal to the Supreme Court of the United States**

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, v. Edmund G. Brown, Jr., Secretary of State of California, Defendant. No. C-72-380-WTS.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that defendant above named hereby appeals to the Supreme Court of the United States from the Order preliminarily enjoining defendant from enforcing directly or indirectly the provisions of California Elections Code sections 6552 and 6553.

This appeal is taken pursuant to 28 U.S.C. section 1253.

Dated: April 6, 1972.

EVELLE J. YOUNGER
Attorney General

ROBERT BURTON
Assistant Attorney General

J. M. SANDERSON
Deputy Attorney General

Attorneys for Defendants

# Supreme Court of the United States

*No.* 71-1383

Edmund G. Brown, Jr., Secretary of
of State of California,

Appellant,

v.

Raymond G. Chots

APPEAL from the United States District Court
for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 16, 1972

In the Supreme Court of the United States

October Term, 1972

No. 72-1282

Edmund G. Brown, Jr., Secretary of State of the State of California,

Appellant,

v.

Raymond G. Chavis

On appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 16, 1972

# Supreme Court of the United States

No. 71-1583

Edmund G. Brown, Jr., Secretary of State of California,

Appellant,

v.

Raymond G. Chota

ON CONSIDERATION of the motion of the appellee for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 16, 1972

In the Supreme Court of the United States

October Term, 1972

No. 71-1383

Edmund G. Brown, Jr., Secretary of State of California,

Appellant,

v.

Raymond G. Storer

ON CONSIDERATION of the motion of the appellant to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be and the same is hereby granted.

October 16, 1972

## SUBJECT INDEX



## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

Statutes

Textbooks

IN THE

# Supreme Court of the United States

October Term, 1971

No. .....

EDMUND G. BROWN, JR., Secretary of State of the State of California,

*Appellant,*

*vs.*

RAYMOND G. CHOTE,

*Appellee.*

On Appeal From the United States District Court for the Northern District of California.

## JURISDICTIONAL STATEMENT

Appellant Edmund G. Brown, Jr., the Secretary of State of the State of California, appeals from the preliminary injunction entered on March 9, 1972, by a specially constituted three-judge United States District Court for the Northern District of California. This statement is submitted to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and substantial questions are presented.

### Opinion Below

The Memorandum of Decision which embodies the preliminary injunction is not yet reported. A copy of said Memorandum of Decision is attached hereto as Appendix A.

## Jurisdiction

Suit was brought in the United States District Court for the Northern District of California for declaratory and injunctive relief pursuant to title 28, United States Code, sections 2201 and 2202, and title 42, United States Code, section 1893. Jurisdiction of the District Court was invoked pursuant to title 28, United States Code, sections 1331 and 1343. Appellee sought a declaration that California Elections Code sections 6552 and 6553 were in violation of the First and Fourteenth Amendments to the United States Constitution. Since appellee sought an injunction against the enforcement of state statutes, a three-judge court was convened pursuant to the authority and requirements of title 28, United States Code, sections 2281 and 2284.

The District Court's opinion and judgment granting declaratory and injunctive relief was entered on March 9, 1972, and appellant's notice of appeal to this Court was filed in the United States District Court for the Northern District of California on April 7, 1972. A copy of the notice of appeal is attached hereto as Appendix B.

The jurisdiction of the Supreme Court of the United States on this direct appeal is conferred by title 28, United States Code, section 1253.

## Statutes Involved

The statutes involved are California Elections Code sections 6552 and 6553 which provide as follows:

Section 6552:

"The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:

"(a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.

"(b) One percent of the first year salary for the office of Representative in Congress or for any office to be voted for in any district comprising more than one county, except the office of State Senator or Assemblyman.

"(c) One percent of the first year salary for the office of State Senator or Assemblyman."

Section 6553:

"The filing fee required to be paid to the Secretary of State pursuant to subdivisions (a) and (b) of Section 6552 shall be paid to the county clerk at the time the forms for nomination are obtained from the county clerk. The filing fee required to be paid to the Secretary of State pursuant to subdivision (c) of Section 6552 shall be paid upon the filing of the candidate's declaration of his intention to become a candidate, pursuant to Section 25500, and such filing fee shall be nonrefundable. The county clerk shall not accept any papers unless the fees are paid at the time required by this section, or unless satisfactory evidence is given to the county clerk or to the registrar of voters that such fee has been paid at the time of the declaration of candidacy in another county. The county clerk shall transmit the fees to the Secretary of State at the time he delivers the declarations of candidacy for filing."

## Questions Presented

Under the decision of this Court in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849 (1972), when a state statute requiring a candidate's filing fee of one per cent (1%) of the first year's salary for the office is challenged on Equal Protection grounds does the "rational basis" or "close scrutiny" standard of judicial review apply?

Do California Elections Code sections 6552 and 6553 deny voters or indigent prospective candidates equal protection of the laws?

## Statement of the Case

California law provides for a party primary to select party nominees for partisan offices to be voted upon at the general election. (Cal. Const. art. II, §2.5; Cal. Elec. Code §6400, *et seq.*) The direct primary in 1972 is on June 6. (Cal. Elec. Code §2501.)

A candidate's name will be printed on the direct primary ballot only if a declaration of candidacy is filed. (Cal. Elec. Code §6490.) The candidate must also cause sponsor certificates to be executed by his sponsors. The number of such certificates varies with the office—for Representative in Congress, the number is not less than 40 nor more than 60. (Cal. Elec. Code §§6493-6495.) The declarations of candidacy and sponsor certificates must be delivered to the county clerk at least 88 days prior to the direct primary. (Cal. Elec. Code §§6499, 6511.) The declarations of candidacy for state and federal offices are forwarded by the county clerk to the secretary of state where they are filed. (Cal. Elec. Code §§6519, 6550.)

Candidates must pay the statutory filing fee not later than the time the nomination forms are obtained from

the county clerk. Fees received from candidates for state and federal offices are transmitted to the secretary of state. (Cal. Elec. Code §6553.)

California law makes provision for an independent nomination process (Cal. Elec. Code §6800, *et seq.*) and for a write-in candidacy (Cal. Elec. Code §§18600-18604). However, such candidates must pay the statutory fees required of other candidates for the same office. (Cal. Elec. Code §§6553, 6555.

The successful candidate in June does not pay another fee for the general election.

Appellee desired to seek the nomination of his party as Representative in Congress from the Seventeenth Congressional District in California. On February 17, 1972, he obtained declaration of candidacy and sponsor certificate forms from the Santa Clara County Registrar of Voters. Appellee obtained the forms by issuing a check in the sum of $425. Typed on the face thereof were the words "written under protest for filing fee." The check was admittedly worthless. [Rep. Tr. pp. 13, 15.] Appellee was informed that his name would not be placed on the primary ballot unless the check in payment of the filing fee was honored at the bank.

On March 3, 1972, appellee commenced an action for declaratory relief and injunction in the United States District Court, Northern District of California. Appellant was directed to show cause on or before March 8, 1972, why a preliminary injunction should not issue. On March 8, 1972, appellant filed written opposition to the granting of a preliminary injunction. The application for a preliminary injunction was heard before the three-judge court on March 8, 1972. Appellee appeared in person without counsel. After argument.

the matter was submitted for decision. [Rep. Tr. pp. 1-22].

On March 9, 1972, the three-judge District Court, Justice Hamlin dissenting, granted a preliminary injunction enjoining appellant from enforcing or applying California Elections Code sections 6552 or 6553 as to appellee and the class represented by appellee. (App. A hereto.) On March 23, 1972, appellant filed an answer to the complaint.

On April 7, 1972, appellant filed a notice of appeal from the order granting a preliminary injunction. (App. B hereto.)

**The Questions Are Substantial**

Reasonable candidate filing fees have been a part of the California Election law for over 60 years. Most states provide for some form of candidate filing fees.[1]

California has long assumed that reasonable candidate filing fees would tend to prevent an indiscriminate scramble for office, tend to limit the ballot to serious candidates, control ballot size, and also would, in a relatively small way, raise revenue to defray a portion of the election costs. The California Supreme Court upheld the early filing fee system in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181 (1909).

The Federal District Courts, in recent years, have sharply divided in cases involving candidate filing fees, over the standard of judicial review under the Equal Protection Clause, whether an alternative means of access to the ballot position is required, or whether party primaries are to be distinguished from final elections.

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[1]The statutes are compiled in 120 U. Pa. L. Rev. 109, 136-42 (1971) and 70 Mich. L. Rev. 558 (1972).

Fees Upheld:

*Wetherington v. Adams*, 309 F. Supp. 318 (N.D. Fla. 1970);

*Fowler v. Adams*, 315 F. Supp. 592 (M.D. Fla. 1970);

*Spillers v. Slaughter*, 325 F. Supp. 550 (M.D. Fla. 1971), *vacated and remanded sub. nom.*;

*Pope v. Halmowitz*, 404 U.S. 806;

*Haag v. State of California*, (C.D. Cal. No. 70-426-R, unrep.), *injunction denied* Mar. 18, 1970.

Fees Invalid:

*Jenness v. Little*, 306 F. Supp. 925 (N.D. Ga. 1969);

*Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035 (N.D. Ga. 1970);

*Thomas v. Mims*, 317 F. Supp. 179, 181 (S.D. Ala. 1970);

*Wong v. Mihaly*, 332 F. Supp. 165 (N.D. Cal. 1971).

In holding that the Texas filing fee system reviewed in *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849 (1972), resulted in a denial of equal protection of the laws, the Court said that it did not intend to cast doubt on reasonable candidate filing fees. (92 S.Ct. at 859.)

The three-judge court below could not agree on whether the California filing fee system was condoned or condemned under *Bullock*. A state appellate court had similarly divided two to one on the question. *Zapata v. Davidson*, 24 Cal. App. 3d 823, 101 Cal. Rptr. 438 (1972) (hearing granted by Cal. S.Ct. May 10, 1972).

## I

## The District Court Erroneously Concluded That Appellant Was Compelled to Justify Elections Code Section 6552 as Necessary to Accomplish Legitimate State Objectives

The Texas filing fee system before this Court in *Bullock v. Carter, supra,* required a candidate to finance the entire cost of primary elections and resulted in patently excessive fees.

In analyzing the threshold consideration whether the Texas system should be sustained if it was shown to have some rational basis or whether it must withstand a more rigid standard of review, this Court in *Bullock* appeared to say that where filing fees are not patently exclusionary but rather are of a size "which most candidates could be expected to fulfill from their own resources or at least through modest contributions," the fees would not have such an impact upon voters as to require the more rigid standard of review. (405 U.S. at 143, 92 S. Ct. at 856.)

Certainly, the California candidate filing fees of one per cent (or two per cent) of the annual salary are reasonable.

*Socialist Party v. Uhl, supra,* 155 Cal. 776, 103 Pac. 181 (1909);

*Bodner v. Gray,* 129 So. 2d 419 (Fla. 1961);

*Spillers v. Slaughter, supra,* 325 F. Supp. 550 (M.D. Fla. 1971).

The District Court's opinion (App. A hereto) assumes that the State had to justify reasonable candidate filing fees as necessary to further legitimate state objectives. Appellant submits that such assumption was unwarranted under the *Bullock* decision.

## II

## Elections Code Section 6552 Which Required Appellee to Pay One Per Cent of the Annual Salary of the Office Sought Is Clearly a Reasonable Candidate Filing Fee and Does Not Constitute a Denial of Equal Protection of the Laws

The Court said in *Bullock:*

". . . It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified on denying an undetermined number of voters the opportunity to vote for candidates of their choice. . . ." (405 U.S. at 149, 92 S.Ct. at 859.)

The issue presented by the instant case is whether reasonable candidate filing fees applicable to all candidates are valid or does California deny poor people equal protection of the laws by not providing an alternative to filing fees, such as a nominating petition signed by a requisite number of electors. A subsidiary issue is whether the reference by this Court in *Bullock* to reasonable filing fees, contemplated something less than one per cent of the annual salary for the office, *e.g.*, the actual costs of processing nomination papers, printing ballots, etc. (*Bullock v. Carter*, n. 29.)

The California filing fee system differs from the Texas filing fee system at issue in *Bullock* in that California does not apportion the total cost of the primary among the candidates. California candidates do not pay the large fees required by Texas law and most candidates could be expected to fulfill California's requirements from their own resources or at least through modest contributions.

The candidates in California relieve the State and county treasury of only a small portion of the expense of conducting primary and general elections. As was pointed out to the court below, a statewide election costs several million dollars. The filing fees for state and federal offices in 1972 were estimated at $225,000 and the administrative costs of the Secretary of State for both the primary and general elections is approximately four times that sum. The counties, while receiving filing fees for local candidates, absorb the bulk of the election costs for all candidates. (Cal. Elec. Code § 10000.)

The extent and nature of the California candidate filing fees do not realistically exclude candidates with a modicum of support. Regardless of the standard of review, the California filing fee system does not deny voters the opportunity to vote for serious candidates and does not deny candidates or voters the equal protection of the laws.

## III

## The Case Is Not Moot

Appellee Chote and several members of his class will be on the June 6 primary ballot. But the injunction below may well apply to write-in candidates, independent nominations, local elections, special elections to fill vacancies, and of course, future primary elections. The decision is also of continuing interest to the Legislature, which, if the decision below is valid, must consider revisions to correct the unfairness of collecting a fee from a thrifty citizen but not from a temporarily impoverished citizen.

Furthermore, the conflicting readings of *Bullock* and the conflicting District Court decisions which preceded the decision prompted a multiplicity of litigation in California in 1972 which should not be repeated in the future.

In February and March, 1972, the following cases were filed which challenged the California candidate filing fees:

*Blaine v. Brown*, Los Angeles Super. Ct. No. 23138;

*Reiff v. Sexton, et al.*, San Diego Super. Ct. No. 331843;

*Caprio v. Brown*, Sacramento Super. Ct. No. 331388;

*Fujii v. Brown*, Sacramento Super. Ct. No. 219924;

*Holstrom v. Brown*, Santa Barbara Super. Ct. No. 95342;

*Alex Brown v. Reagan*, U.S.D.C., E.D. Cal. No. F 627 Civil.

Thus, the validity of reasonable candidate filing fees reflects a continuing controversy in the federal-state area which is certain of repetition. The matter is not moot.

*Moore v. Ogilvie*, 394 U.S. 814, 816 (1969);
*Whitcomb v. Chavis*, 403 U.S. 124, 140-41 (1971);
*So. Pac. Terminal Co. v. Int. Comm.*, 219 U.S. 498, 515 (1911).

## Conclusion

The District Court majority decision erroneously reads this Court's opinion in *Bullock* as invalidating the California candidate filing fees.

It is submitted that the District Court majority has erred, that the questions presented by this appeal are substantial, that they are of great nationwide, public importance, and that they deal with important California election laws. It is urged that probable jurisdiction be noted.

Respectfully submitted,

EVELLE J. YOUNGER,
*Attorney General,*
ROBERT BURTON,
*Assistant Attorney General,*
HENRY G. ULLERICH,
*Deputy Attorney General,*
By HENRY G. ULLERICH,
*Attorneys for Appellant.*

## APPENDIX A.

### Memorandum of Decision.

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, vs. Edmund G. Brown, Jr., Secretary of State of California, Defendant. No. 72380.

Before: HAMLIN,* Circuit Judge, WOLLENBERG and SWEIGERT, District Judges.

Plaintiff alleges in effect that he has been advised by the Registrar of Voters of Santa Clara County that a fee of $425 must be paid in advance to entitle plaintiff to a place on the ballot for the June 6th primary election for the office of Representative to Congress from the 17th District; that plaintiff is financially unable to pay that fee and that March 10th is the closing date for filing.

California Elections Code, Section 6552 provides that the fee payable to the Secretary of State for filing a declaration of candidacy for the office of Representative in Congress shall be one percent (1%) of the first year's salary for that office, i.e., $425.

Section 6553 provides that the filing fee required to be paid to the Secretary of State shall be paid to the County Clerk at the time for forms for nomination are obtained; that the County Clerk shall not accept any papers unless the fees are paid at the time; that the County Clerk shall transmit the fees to the Sceretary of State at the time he delivers the declaration of filing.

Plaintiff, contending that these statutes are unconstitutional and in violation of the equal protection

*Judge Hamlin dissents.

clause of the Fourteenth Amendment of the Constitution of the United States, asks for a declaratory judgment and a preliminary injunction.

The suit is brought under the Civil Rights Act, Title 42 U.S.C. Section 1983. The Court accepts jurisdiction under 28 U.S.C. Section 1343(3) and, sitting as a court of three judges as required by 28 U.S.C. Section 2281, has heard plaintiff's application for preliminary injunction and the State's opposition thereto.

It has already been held in this district that a provision of the Charter of the City and County of San Francisco, requiring prepayment of a $175 filing fee as a condition for placement of a candidate's name on the ballot for the office of Supervisor, is a discrimination against those who are unable to pay the fee and a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. *Kim Wong v. Milhaly*, 332 F.Supp. 165 (N.D.Calif. 1971).

That decision, after consideration of conflicting decisions among other districts, cited and relied upon a series of cases holding in effect that a law prohibiting candidates from getting their names on the ballot solely because they cannot post a certain amount of money is unconstitutional as a deprival of equal protection of law; that such a statute can stand only when there is some alternative method whereby a candidate who is unable to pay the filing fee, can get on the ballot either by nominating petition, primary election or pauper's affidavit. *Georgia Socialist Workers Party v. Fortson*, 315 F.Supp. 1035 (N.D.Ga. 1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D.Ga. 1969)[1] and, specifically,

[1] In *Haug v. State*, Central District, California, No. 70 426-R, 3/18/70, a three judge District Court denied preliminary injunc-

upon *Carter v. Dies*, 321 F.Supp. 1358 (N.D.Tex. 1970), which has been recently affirmed by the Supreme Court of the United States in *Bullock v. Carter*, ..... U.S. ..... (2/24/72).

Our pending case is the first to arise since the Supreme Court has spoken and, of course, that decision is controlling here.

In *Bullock*, the Supreme Court considered a Texas primary election statute which set up a system of filing fees for various offices.[2] The Court (p. 15) although recognizing the validity of "reasonable candidate filing fees and licensing fees in other contexts," concludes that by requiring a candidate to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot is to erect a system which utilizes the criterion of ability to pay as a condition to getting on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice."

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tion in a comparable case wherein various Peace and Freedom Party members sought placement on the ballot for the primary election of June 2, 1970. However, the ground for denial seems to have been that the plaintiffs "had available to them as an alternative at this posture of these proceedings, the ability to seek nomination of their party without paying any filing fee, since the statute under attack prohibits only the qualification of candidates for the *general* election upon non-payment of the required fee 5 days prior to the primary election." See order of 5/18/70. Further, it is to be noted that Circuit Judge Ely was quoted in the order as dissenting and as entertaining the view that "to condition the candidacy for public office for otherwise qualified citizens upon their financial ability to pay a fee not specifically related to the cost of the present elective process is invidiously discriminatory and not justified by any compelling interest of the State of California."

[2]Under the Texas election filing fee system, which was struck down as a whole, the fees ranged from $150 (less than the amount here involved) to as high as $8,900.

The Supreme Court, although recognizing (p. 13) that the state has a legitimate interest in using filing fees to relieve the state treasury of the cost of conducting primary elections, concludes that "there must be a showing of necessity."

In the present case no showing has been made by the state that covering the costs of elections is even the purpose of the statutory filing fee here in question. On the contrary, the statute ties the filing fee, not to election costs or costs of the filing process, but arbitrarily to the salary of the office sought. Further, even if such were the state purpose, the Supreme Court (p. 14) indicates that, when it is speaking of "reasonable" candidate filing fees, it has in mind merely filing fees sufficient "to cover the cost of filing, that is, the cost of placing a particular document on the public record." No showing has been made that such is either the purpose or extent of the filing fee here in question.

The Supreme Court, although recognizing the state has a legitimate interest in regulating the number of candidates on the ballot to prevent the overcrowding of the ballot, the clogging of its election machinery and voter confusion, concludes (p. 11) that "a state cannot achieve its objectives by totally arbitrary means" and that if the state's purpose is to weed out spurious candidates, "other means to protect those valid interests are available."

Further, the Supreme Court, pointed out (p. 2) that under the Texas primary election law "There is no alternative procedure by which a potential candidate, who is unable to pay the fee, can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office."

In our pending case California law makes no provision for any such alternative method by which an indigent candidate can get himself on the ballot.

That the burden is upon the state, not the plaintiff, to establish the requisite justification for its filing fee system, has been clearly indicated by the Supreme Court (p. 15); further, it has held that filing fee laws must be tested, not merely by the "rational basis rule" but by the strict standard of review set by *Harper v. Virginia*, 383 U.S. 663 (1966), i.e., it "must be closely scrutinized and found reasonably necessary to the accomplishment of state objectives in order to pass constitutional muster," . . . "there must be a showing of necessity." (pp. 10, 13).

Since no such showing has been made by the State, concerning either the necessity, the purpose or the reasonableness of the filing fee statutes in question, we conclude that within the rationale and holding of *Bullock*, supra, plaintiff may prevail on the merits and that, absent a preliminary injunction, his constitutional right may be irreparably lost.

It is, therefore, ordered and decreed that defendant, Secretary of State of California, his successor in office or agents or employees and all other persons in active concert or participation with him, including County Clerks or Registrars of Voters charged by Section 6553 with the collection of election filing fees, be and they are hereby preliminarily enjoined from enforcing, following or applying, either directly or indirectly as to plaintiff, Raymond G. Chote, the provisions of said California Elections Code Sections 6552 or 6553, provided, however, that this order shall be applicable only if (1) said plaintiff is otherwise eligible under the

State or other applicable election laws, and (2) said plaintiff files with defendant, Secretary of State, or the proper County Clerk or Registrar of Voters, an affidavit that he has no property or money from which to pay the said required filing fee and is, therefore, financially unable to pay the same.

This preliminary injunction, and the terms and conditions thereof, shall apply also to persons represented as a class in this action by plaintiff, to wit, persons in substantially the same position as plaintiff herein, and (1) who are otherwise eligible under the state or other applicable election laws, and (2) who file with defendant, Secretary of State, or the proper County Clerk or Registrar of Voters, an affidavit that he has no property or money from which to pay the said required filing fee and is, therefore, financially unable to pay the same.

Dated: March 9, 1972.

ALBERT C. WOLLENBERG
UNITED STATES DISTRICT JUDGE
W. T. SWEIGERT
UNITED STATES DISTRICT JUDGE

HAMLIN, Circuit Judge, Dissenting:

In *Bullock v. Carter*, No. 70 128, February 24, 1972, the United States Supreme Court in discussing such a question in reference to filing fees in Texas said: "It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." It has not been shown in this case that the filing fee complained of is not reasonable.

Accordingly, applicant's request for injunctive relief and a declaration that Sections 6552 and 6553 are unconstitutional should be denied.

Dated: March 9, 1972.

/s/ Oliver D. Hamlin
UNITED STATES CIRCUIT JUDGE

## APPENDIX B.

### Notice of Appeal to the Supreme Court to the United States.

United States District Court, Northern District of California.

Raymond G. Chote, Plaintiff, v. Edmund G. Brown, Jr., Secretary of State of California, Defendant. No. C-72-380-WTS.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that defendant above named hereby appeals to the Supreme Court of the United States from the Order preliminarily enjoining defendant from enforcing directly or indirectly the provisions of California Elections Code sections 6552 and 6553.

This appeal is taken pursuant to 28 U.S.C. section 1253.

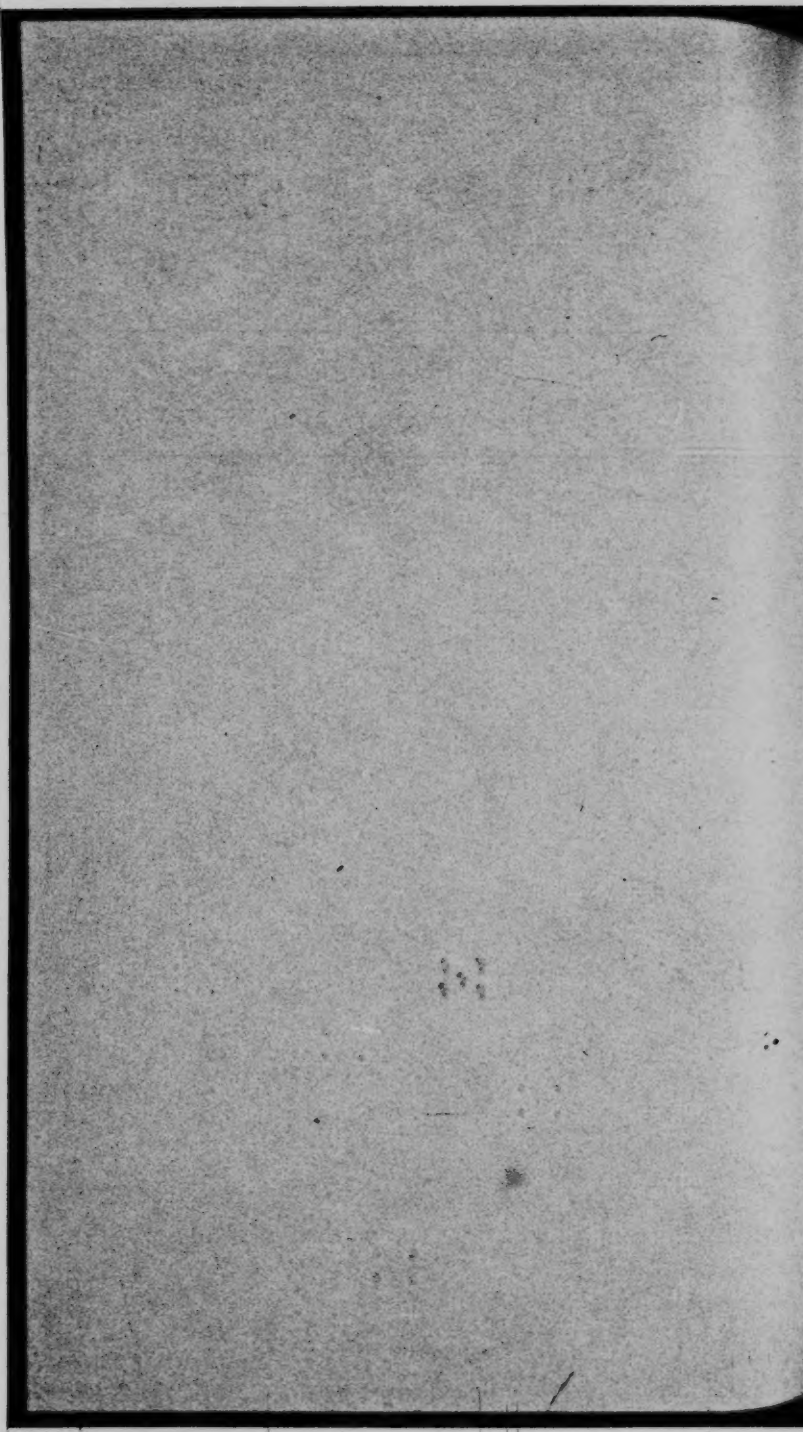
Dated: April 6, 1972.

EVELLE J. YOUNGER
Attorney General

ROBERT BURTON
Assistant Attorney General

J. M. SANDERSON
Deputy Attorney General

Attorneys for Defendants



## SUBJECT INDEX

## TABLE OF AUTHORITIES CITED

IN THE

# Supreme Court of the United States

October Term, 1972
No. 71-1583

EDMUND G. BROWN, JR., Secretary of State of the State of California,

*Appellant,*

*vs.*

RAYMOND G. CHOTE,

*Appellee.*

**On Appeal From the United States District Court for the Northern District of California**

## BRIEF FOR THE APPELLANT

### Opinion Below

The opinion of the District Court is reported at 342 F. Supp. 1353.

### Jurisdiction

The judgment of the District Court was entered March 9, 1972. (App. p. 34.) A notice of appeal to this Court was filed on April 7, 1972. (App. p. 44.) The jurisdictional statement was filed June 5, 1972, and probable jurisdiction was noted October 16, 1972. The jurisdiction of this court rests on 28 U.S.C. 1253.

## Questions Presented

When challenged on Equal Protection grounds, is the standard of review of the California candidate filing fee system the traditional rational basis test, *i.e.*, the statutes will be set aside only if no rational basis can be conceived to justify them or must the statutes be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives?

Do sections 6552 and 6553 of the California Elections Code, which require the payment of a candidate filing fee of one percent of the first year's salary for the office of Representative in Congress as applied to a prospective candidate who is personally without sufficient property or money to pay the fee, operate to deny the Equal Protection of the laws?

## Statutes Involved

California Elections Code section 6552 provides:

> "The following fees for filing declarations of candidacy shall be paid to the Secretary of State by each candidate:
>
> "(a) Two percent of the first year salary for the office of United States Senator or for any state office. The fee prescribed in this subdivision does not apply to the office of State Senator or Assemblyman or to an office to be voted for in a district comprising more than one county.
>
> "(b) One percent of the first year salary for the office of Representative in Congress or for any office to be voted for in any district comprising more than one county, except the office of State Senator or Assemblyman.
>
> "(c) One percent of the first year salary for the office of State Senator or Assemblyman."

California Elections Code section 6553 provides:

"The filing fee required to be paid to the Secretary of State pursuant to subdivisions (a) and (b) of Section 6552 shall be paid to the county clerk at the time the forms for nomination are obtained from the county clerk. The filing fee required to be paid to the Secretary of State pursuant to subdivision (c) of Section 6552 shall be paid upon the filing of the candidate's declaration of his intention to become a candidate, pursuant to Section 25500, and such filing fee shall be nonrefundable. The county clerk shall not accept any papers unless the fees are paid at the time required by this section, or unless satisfactory evidence is given to the county clerk or to the registrar of voters that such fee has been paid at the time of the declaration of candidacy in another county. The county clerk shall transmit the fees to the Secretary of State at the time he delivers the declarations of candidacy for filing."

California Elections Code section 6554 provides:

"A filing fee of ten dollars ($10) shall be paid to the county clerk for filing a declaration of candidacy for an office to be voted for wholly within one county with the following exceptions:

"(a) No filing fee is required from any person to be voted for at the presidential primary.

"(b) No filing fee is required from any candidate for an office for which no fixed compensation is payable.

"(c) No filing fee is required for offices the compensation for which does not exceed the sum of six hundred dollars ($600) annually.

"(d) A filing fee of 1 percent of the annual salary of the office shall be paid to the county clerk by each candidate for a judicial office or for the office of district attorney.

"(e) The filing fee to be paid to the county clerk by each candidate for a county office, other than a judicial office and the office of district attorney, shall be the same percentage of the annual salary of the office as that provided for in subdivision (a) of Section 6552 of this code. This subdivision shall not apply to any candidate for any office for which the annual salary is two thousand five hundred dollars ($2,500) or less."

California Elections Code section 6556 provides:

"The county clerk shall pay to the county treasurer all fees received from candidates pursuant to Section 6554. Within 10 days after the direct primary, the Secretary of State shall pay to the State Treasurer all fees received from candidates pursuant to Section 6552, which shall be deposited in the General Fund.

"It is the intention of the Legislature that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year."

**Statement of the Case**

Appellee Chote desired to appear on the ballot for the June 6, 1972 California Primary Election as a nominee to be the Democratic candidate in the general election for the office of Representative in Congress from the 17th Congressional District.

California law provides for a party primary to select party nominees for partisan offices to be voted upon at the general election. (Cal. Const., art. II, § 2.5; Cal. Elec. Code §§ 6400 *et seq.*) For a candidate's name to appear on the primary ballot, the candidate or his sponsors must execute a declaration of candidacy (Cal. Elec. Code §§ 6490-6491) and must obtain and file sponsor certificates (not less than 40 nor more than 60 for Representative in Congress (Cal. Elec. Code §§ 6494-6495)). With the exception of certain noncompensated or low compensated offices (Cal. Elec. Code § 6554), candidates for state and local office must pay a filing fee of one or two percent of the first year salary of the office (Cal. Elec. Code §§ 6552-6554). Under statutes in effect at the most recent election for each office, the filing fee for state offices ranged from $192 for State Assembly, $425 for Congress, $850 for United States Senator (six-year term) and $982 for Governor (four-year term).

The party nominee selected at the primary does not pay another filing fee for the general election.

California law provides for a write-in candidacy at both the primary and general election. But write-in candidates must also file a declaration of candidacy and pay the statutory filing fee for the office. (Cal. Elec. Code §§ 18601-18604; 6555.) California provides an independent nomination process for the final election. (Cal. Elec. Code § 6800 *et seq.*) Independent candidate nominees must also pay the statutory candidate filing fees. (Cal. Elec. Code § 6802, 6552-6554.)

The sponsor certificates must be delivered to the county clerk at least 88 days prior to the direct primary election. (Cal. Elec. Code § 6499.) In 1972, the deadline was March 10.

On February 17, 1972, appellee obtained the declaration of candidacy and sponsor certificate forms from the Santa Clara County Registrar of Voters. Appellee obtained the forms by issuing a check in the sum of $425. Typed on the face thereof were the words "written under protest for filing fee." The check was admittedly worthless. (App. pp. 26, 29-30.) Appellee was informed that his name would not be placed on the primary ballot unless the check in payment of the filing fee was honored at the bank. (App. p. 7.)

On March 3, 1972, appellee commenced an action for declaratory relief and injunction in the United States District Court, Northern District of California. (App. pp. 3-9.) The Secretary of State was directed to show cause on or before March 8, 1972, why a preliminary injunction should not issue. (App. pp. 10-11.) On March 8, 1972, appellant filed written opposition to the granting of a preliminary injunction. (App. p. 12.) The application for a preliminary injunction was heard before the three-judge court on March 8, 1972. Appellee appeared in person without counsel. After argument, the matter was submitted for decision. (App. pp. 18-33.)

On March 9, 1972, the three-judge District Court, Justice Hamlin dissenting, granted a preliminary injunction enjoining appellant from enforcing or applying California Elections Code sections 6552 or 6553 as to appellee and the class represented by appellee. (App. pp. 34-39.) On March 23, 1972, appellant filed an answer to the complaint. (App. p. 41.)

On April 7, 1972, appellant filed a notice of appeal from the order granting a preliminary injunction. (App. p. 44.)

## Summary of the Argument

The California candidate filing fee system differs in size of the fees and the method of computation from the Texas system characterized as "patently exclusionary" in *Bullock v. Carter*, 405 U.S. 134 (1972). The California fees are specified by state statute in a reasonable amount. The aggregate of fees collected represent only a reasonable portion of the governmental election costs. Because most candidates could be expected to pay the California fee from their own resources or through modest contributions (see: *Bullock v. Carter, supra*, 405 U.S. at 143), the California candidate fees do not realistically burden the exercise of voting rights to an extent which would require the statutes to withstand the more rigid standard of review applied in *Bullock v. Carter*.

Under the traditional "rational basis" test, the California candidate filing fee system furthers legitimate interests and does not unlawfully discriminate against candidates or voters. Even assuming that the more rigid standard of review applied in *Bullock* is applicable herein, the California statutes are reasonably necessary to the accomplishment of legitimate state objectives.

## ARGUMENT

### I

### A Reasonable Candidate Filing Fee Does Not Discriminate Against Voters or Serious Candidates and Should Be Sustained Under the Traditional Equal Protection Standard of Review

A majority of the District Court held that as to indigent prospective candidates for public office, the California statutes requiring a candidate filing fee violated the Equal Protection Clause of the Fourteenth Amendment.

In determining whether a state law violates the Equal Protection Clause, the Court considers the facts and circumstances behind the law, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), the character of the classification, the individual interests affected by the classification, and the governmental interests asserted in support of the classification, *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). As the court noted in *Bullock v. Carter, supra*, 405 U.S. 134, 142 (1972):

> "The threshold question to be resolved is whether the filing-fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review."

*See also:*

*McDonald v. Board of Election*, 394 U.S. 802, 806-07 (1969).

In *Bullock v. Carter, supra*, 405 U.S. 134 (1972), the Court concluded that the Texas candidate filing fee system operated to deny the equal protection of the laws. That system required candidates to pay a fee

determined by the county executive committee of the political party conducting the primary as an apportioned cost of the primary; the assessed fees for the appellees in that case varied from $1,000 to $6,300; and there was no alternative procedure in Texas to appear on the primary ballot without the payment of a filing fee.

The Court in *Bullock* recognized that filing fees further legitimate governmental interests:

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. Jenness v. Fortson, 403 U.S., at 442; Williams v. Rhodes, 393 U.S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense of burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. Jenness v. Fortson, 403 U.S., at 442." (405 U.S. at p. 145.)

The Court in *Bullock* seemingly recognized that reasonable statutory candidate filing fees would not realistically have such an impact upon voters as to require the rigid standard of review. (405 U.S. at 143.)

Reasoning that a substantial group of supporters would have difficulty meeting the large fees imposed under the Texas system, the Court concluded that the Texas fee system was subject to "close scrutiny." The Court then concluded that the Texas system was not *necessary* to regulate the ballot nor was it *necessary* for a state to finance the entire cost of the primaries through candidate filing fees. The opinion of the Court concludes:

> "Since the State has failed to establish the requisite justification for *this* filing-fee system, we hold that it results in a denial of equal protection of the laws. *It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees* or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to the determination of constitutional invalidity." (405 U.S. at 149; emphasis added.)

The California filing fees are set by statute not by political parties at a percentage of the annual salary of the office. A fee of one or two percent of the annual salary is a reasonable fee.

> *State ex rel. Apodaca v. Fiorina*, 83 N.M. 663, 495 P.2d 1379, 1384 (1972) (6% of first year's salary);

*Spillers v. Slaughter,* 325 F. Supp. 550 (M.D. Fla. 1971); *judgment vacated as moot, Pope v. Haimowitz,* 404 U.S. 806 (5% of annual salary);

*Fowler v. Adams,* 315 F. Supp. 592, 595 (M.D. Fla. 1970 (5% of annual salary);

*Thomas v. Mims,* 317 F. Supp. 179 (S.D. Ala. 1970) (2% of annual salary);

*Bodner v. Gray,* 129 So. 2d 419, 420 (Sup. Ct. Fla. 1961), noted 89 A.L.R.2d 864 ($875 fee for office of justice of Supreme Court);

*McLean v. Durhan County Board of Elections,* 222 N.C. 6, 21 S.E. 2d 842 (1942) (1% of annual salary).

Nor does California place the burden of financing primary elections on the candidates. Under the California system, the candidate fees reimburse state and local government for only a reasonable portion of the total election cost.[1]

In considering the proper standard of review, this Court noted in *Bullock v. Carter, supra,* 405 U.S. at 143, that statutes such as California Elections Code sections 6552 and 6553 do not deprive voters of the opportunity to vote nor do they quantitatively dilute votes.

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[1]The Secretary of State is budgeted for over one million dollars for election expense of that office in 1972. The total fees forwarded to that office from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577.

The counties print the sample and final ballots, pay the election officers, purchase voting equipment. (Elec. Code § 10,000.) Thus, general tax funds provide the primary source of funds to defray election cost at both the state and local level.

The Court's opinion then continued:

> ". . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.
>
> "Unlike a filing-fee requirement that most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character." (405 U.S. at 143.)

Realistically, the California statutes do not invidiously discriminate against voters or prevent voters from voting effectively. Clearly, not all interest groups can have a hand-picked candidate on the ballot. Without a limitation upon the number of candidates running for office, voting machines and other mechanical devices would not function properly and the election processes could not proceed in an orderly fashion. The clogging of election machinery, voter confusion, fragmentation of vote resulting from a large numbers of candidates would tend to impede rather than assure an effective vote. The candidate filing fees actually developed from a political reform movement with the premise that reasoned choice was enhanced by reducing the number of choices to be made. (70 Mich. L. Rev. 558 (1972).)

Taking cognizance of the realistics of money in election campaigns (*see:* 46 N.Y.U. L. Rev. 900, 901; 60 Cal. L. Rev. 1371 (1972), the latter article noting that in 1970 the 35 winners of gubernatorial seats spent an average of $145,883 on the electronic media), voters

cannot realistically hope to elect "their" candidate without the financial ability to pay a reasonable candidate filing fee.

A candidate filing fee thus requires a segment of the voting population to realistically weigh their chances in supporting a candidate. If 425 voters believe in a candidate, $1 per voter will place their candidate on the ballot seeking the party nomination for Representative in Congress. Viewed in that context, the candidate's lack of personal resources is not a significant let alone a critical factor.

Furthermore, candidate filing fees should either be required of all candidates or of none. It is illogical to deter an employed community minded citizen who is reluctant to dip into his meager savings from running for office and yet afford a welfare recipient a place on the ballot.

It is reasonable to exclude some aspiring candidates from the ballot. It is reasonable to prevent the clogging of election machinery. It is reasonable to seek reimbursement for a small portion of the total election costs.

Accepting the clear implication of *Bullock* that the states are not powerless to impose some form of candidate filing fee, a reasonable fee which reimburses state and local treasuries for no more than a reasonable portion of the total election cost does not deny voters or candidates the equal protection of the laws.

II

**Reasonable Candidate Fees Applicable to All Candidates Are Also Reasonably Necessary to Further Legitimate State Interests**

California statutes have provided for candidate filing fees since 1909. The original fees, which then scaled from $10-50, were challenged and upheld by the State Supreme Court in *Socialist Party v. Uhl*, 155 Cal. 776, 103 Pac. 181 (1909). The Court's opinion in that case provided in part:

> "It is provided in the act that these fees are to be paid into the county or municipal treasury when they are paid by county or municipal candidates, and when paid by candidates for state or district nominations are to be apportioned and paid by the state treasurer to the county treasurer of the counties in which such candidates are to be voted for. The validity of this provision requiring the payment of fees is sustainable under the constitutional amendment, as being within the power of the legislature to provide reasonable conditions for the exercise of the rights granted by the primary law. As said by one court to which this question was presented: 'The right to exact a reasonable fee for the privilege of running for office may be sustained, on the principle that fees in actions and proceedings in courts, and for filing and recording papers, are sustainable; namely, that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the costs the state incurs in maintaining the instrumentality to carry into effect the particular proceeding. In other words the state asks the candidate for office

under a particular law to reimburse it for a part of the expenses it incurs in carrying that law into effect. This clearly the state may lawfully do.' (State v. Nichols, 50 Wash. 508, [97 Pac. 728, 730].)

"Aside from this, such a provision is a reasonable restriction and provides an orderly and systematic method by which the people may select their candidates for public office. The exaction of a fee tends to prevent an indiscriminate scramble for office. Where it is fixed at an amount that will impose no hardship upon any person for whom there should be any desire to vote as a nominee for any office, and yet enough to prevent the wholesale filing of petitions for nominations of any one regardless of whether or not he is a desirable candidate. It is but a reasonable means adopted by the legislature to regulate primary elections for the selection of candidates for public office. And the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as to the payment of a fee, but is a reasonable regulation prescribed by the legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office and whose candidacy calls for the payment of the fee required by the act will be at no difficulty to pay the required amount. (State v. Scott, 99 Minn. 145, [108 N.W. 829]; see also, Montgomery v. Schlef, 118 Ky. 766, [82 S.W. 389].)" (155 Cal. at 789-90.)

The state courts in other states have, as a general rule, upheld their candidate filing fee statutes as rea-

sonable legislation not violative of pertinent state constitutional provisions. For cases upholding a fee larger than a nominal fee for the services of offices processing the nomination papers, *see:*

*Bodner v. Gray, supra,* 129 So. 2d 419 (Sup. Ct. Fla. 1961) ($875 fee for office of justice of the supreme court not unreasonable);

*Munsell v. Hennegan,* 182 Md. 15, 31 A.2d 640 (1943) ($.25 a name of voters on nominating petition);

*McLean v. Durham County Board of Elections, supra,* 222 N.C. 6, 21 S.E.2d 842 (1942) (1% of the annual salary of the office);

*State v. Brodigan,* 37 Nev. 492, 143 Pac. 238 (1914) ($100 for office of Secretary of State);

*State v. Nichols,* 50 Wash. 508, 97 Pac. 728, 730 (1908) (Court describes as reasonable fee);

*State v. Scott,* 99 Minn. 145, 108 N.W. 828 (1906) ($10-20);

*Kenneweg v. Allegany County Com'rs.,* 102 Md. 119, 62 A. 249 (1905) (fee scaled to office);

*Montgomery v. Chelf,* 118 Ky. 766, 82 S.W. 388, 390 (1904) (all candidates for two officers paid apportioned share of $800).

Some courts have either construed their state constitutions as precluding other than nominal fees or simply held the particular candidate fees arbitrary:

*State v. Drexel,* 74 Neb. 776, 105 N.W. 174 (1905) (1% of salary for full term of office);

*People v. Board of Election Com'rs. of Chicago,* 221 Ill. 9, 77 N.E. 321 (1906) (fees not related to services in filing the papers or the expenses of the election);

*Ballinger v. McLaughlin,* 22 S.D. 206, 116 N.W. 70 (1908); (maximum fee $15);

*Johnson v. Grand Forks County,* 16 N.D. 363, 113 N.W. 1071 (1907) (2% of the annual salary);

*Ledgerwood v. Pitts,* 125 S.W. 1036, 1045-1046 (1910); (scaled from $10 to $500);

*Kelso v. Cook,* 184 Ind. 173, 110 N.E. 987, 996 (1916) (1% of annual salary).

Subsequent to the advent of the new equal protection test in voting rights cases, several federal district courts refused injunctive relief against the Florida and California candidate filing fee systems.

*Spillers v. Slaughter,* 325 F. Supp. 550 (M.D. Fla. 1971), *vacated sub nom, Pope v. Haimowitz,* 404 U.S. 806;

*Fowler v. Adams,* 315 F. Supp. 592 (M.D. Fla. 1970), *appeal dismissed for lack of jurisdiction,* 400 U.S. 986 (1971); or 400 U.S. 1205 (1970);

*Wetherington v. Adams,* 309 F. Supp. 318 (N.D. Fla. 1970);

*Haag v. State of California,* Unrep. (C.D. Cal. No. 70-426 R, March 18, 1970).

Several courts did not find sufficient state interests to justify the particular fees at least without a non-monetary alternative route to ballot listing.

*Jenness v. Little, supra,* 306 F. Supp. 925 (N. D. Ga. 1969), *appeal dismissed as moot sub nom., Matthews v. Little,* 397 U.S. 94 (1970);

*Thomas v. Mims, supra,* 317 F. Supp. 179, 181 (S.D. Ala. 1970);

*Wong v. Mihaly,* 332 F. Supp. 165 (N.D. Cal. (1971) (municipal charter);

*Duncantall v. City of Houston, Texas,* 333 F. Supp. 973 (S.D. Tex. 1971);

*Socialist Workers Party v. Welch,* 334 F. Supp. 179, 182 (S.D. Tex. 1971);

*Johnston v. Luna,* 338 F. Supp. 355 (N.D. Tex. 1972).

As noted in several law review articles on the subject of candidate filing fees, 60 Cal. L. Rev. 1371-1384 (1972), 70 Mich L. Rev. 558 (1972), 120 U. Pa. L. Rev. 109 (1971), 9 Santa Clara Lawyer 169 (1968), lower court decisions vary with the size of the fee, primary vs. final election and scope of judicial review, and cannot really be reconciled.

The state interests furthered by candidate fees are usually described as avoiding an indiscriminate scramble for office, limiting the size of the ballot to avoid voter confusion and fragmentation of votes, and to defray at least a portion of the cost of elections. Even assuming *arguendo,* that none of the interests, considered individually, is "compelling" or "reasonably necessary," evaluated in the aggregate the described interests outweigh any impact of reasonable filing fee requirements upon the interest of voters or candidates.

Actual experience has demonstrated that fears of lengthy ballots and frivolous candidates are not unfounded. In 1972, the Federal District Court in New Mexico invalidated that state's filing fee of six percent of the annual salary. *Dillon v. Fiorina,* 340 F. Supp. 729 (D. N.M. 1972). Thereafter, 28 candidates filed

for the Democratic nomination for United States Senator and 12 candidates filed for the Republican nomination for that office. Only four candidates paid filing fees. *See: State ex rel. Apodaca v. Florida, supra,* 495 P.2d 1379, 1381 (Sup. Ct. N.M. 1972).[2]

The conflicting lower court decisions could arguably lead to the following conclusions:

1. All candidate filing fees are invalid and cannot be imposed upon any candidate because any fee is a deterrent to qualified candidates whether the citizen is temporarily impoverished or regularly employed.

2. Reasonable candidate filing fees applicable to all candidates are valid.

3. Reasonable candidate filing fees are valid only if the state provides an alternative non-financial means of access to the ballot such as a nominating petition. However, a substantial nominating petition may involve money—either to actually gather the signatures or a government charge for checking the signatures. Also, nominating petitions are not necessarily a reliable gauge of support. (*See: State ex rel. Apodaca, supra,* 495 P.2d 1379 at 1383.) Finally, a substantial petition requirement could be challenged as a more burdensome requirement than imposed upon wealthy candidates.

4. The size of the fee is immaterial if the state provides a non-financial nominating petition as an alternative to the fee. (*But see: Johnson v. Luna, supra,* 338 F. Supp. 355 (N.D. Tex. 1972).)

It may be that *Bullock* established a new equal protection standard somewhere between the "rational

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[2]California has not had a real experience because the judgment below was rendered on March 9 and filing ended on March 10. Few candidates could complete and file the nomination papers in 24 hours.

basis" and the "compelling interest" tests. But as we read the opinion in that case, the Court did not intend to invalidate reasonable candidate filing fees in all states nor was the Court insisting that all states which utilize filing fees must experiment with a non-financial alternative means of access to the ballot. Thus, appellant submits that reasonable candidate filing fees applicable to all candidates are not a denial of Equal Protection of the laws.

**Conclusion**

For the reasons stated, it it respectfully submitted that the judgment of the court below, enjoining the enforcement or application of California Elections Code sections 6552 or 6553 as to appellee and the class represented by appellee, should be reversed.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1583

EDMUND G. BROWN, JR.,
Secretary of State of the
State of California,

*Appellant,*

v.

RAYMOND G. CHOTE,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

## BRIEF FOR APPELLEE

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# TABLE OF CONTENTS



## TABLE OF CITATIONS

*Cases:*

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---

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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## BRIEF FOR APPELLEE

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The narrow question presented is whether this case is distinguishable from *Bullock v. Carter*, 405 U.S. 134. Appellee submits that it is not.

In *Bullock* a unanimous Court last Term held invalid, under the Equal Protection Clause of the Fourteenth

Amendment, Texas' primary election filing-fee system. Under the Texas system, candidates who could not afford to pay the required fees were, for that reason alone, absolutely excluded from the ballot. The "salient features" of the Texas system that the Court deemed "critical" to its "determination of constitutional invalidity" (405 U.S. at 149) are also present in California's system.

The Attorney General of California seeks to save his state's filing-fee system, despite its exclusion of poor candidates from participation in elections, by pointing to differences from the Texas system, particularly in regard to the size of the required fees and the method of computation. These differences are peripheral, and indeed irrelevant, to the constitutional analysis and judgment required under *Bullock*.

What was "critical" in *Bullock*, and is equally dispositive here, is that:

(1) The filing-fee system falls with unequal weight on voters, as well as candidates, according to their economic status (405 U.S. 144).

(2) While a state has a legitimate interest in regulating the number of candidates on the ballot and may protect the integrity of its political processes from frivolous or fraudulent candidacies, it cannot pursue those objectives by arbitrary means (405 U.S. at 145).

(3) Since filing fees exclude legitimate as well as frivolous candidates, solely because of their indigency, a filing-fee requirement "is extraordinarily ill-fitted to [the] goal" of regulating the ballot by weeding out spurious candidates; "other means to protect those valid interests are available" (405 U.S. at 146).

(4) Where a state "has, as a matter of legislative choice, directed that party primaries be held" and "has presumably chosen this course more to benefit the voters than the candidates," the conduct of primary elections is a governmental function, the cost of which may not "be shifted away from the taxpayers generally" to the candidates; a "different case" would be presented, however, where the filing fees cover only "the cost of processing a candidate's application for a place on the ballot" (405 U.S. at 148).

(5) By requiring filing fees of candidates and providing no reasonable alternative means of access to the ballot, the state "has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (405 U.S. at 149).

Here, as in *Bullock*, a strict standard of review is appropriate because the legislative classification is "suspect" and impinges upon the fundamental rights of voting and political association. In California, as in Texas, there is no way that voters can have their candidate considered for the party nomination if he cannot post the filing fee.

Even if the traditional standard of review were applied, the California filing-fee system would not meet the requirements of the Equal Protection Clause. Under the "rational basis" test, a legislative classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation," *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415. In

*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, a classification was struck down because the Court could find "no significant relationship" to the statutory purposes.

No legitimate state interest, whether in regulating the ballot (cf. *Bullock, supra*, at 145; *Jenness v. Fortson*, 403 U.S. 431, 442), or in requiring candidates to pay a fair share of primary election costs (but cf. *Bullock, supra*, at 147-48), is served by a filing-fee system where (a) the amount of the fee that a candidate must pay bears no relation at all to the costs attributable to his candidacy, but is based instead on a specified percentage of the salary for the office sought, and (b) an indigent, otherwise qualified candidate's inability to pay the fee results in his exclusion from the ballot, thus denying his supporters any opportunity to vote for the candidate of their choice. The California filing-fee system draws a line between candidates and voters based solely on their financial means. That kind of line is clearly forbidden by the Equal Protection Clause.

This conclusion does not compel invalidation of all candidate filing-fee requirements *per se*. As the Court indicated in *Bullock* (405 U.S. at 148, note 29), "a different case" would be presented where the fees approximate the administrative costs of filing or processing candidates' applications. As a practical matter, it seems unlikely that such true filing fees, necessarily modest in amount, *e.g.*, $5 or $10, would exclude any serious candidate. In any event, an indigent candidate could not be excluded from the ballot solely because of his inability to pay a fee, even though it may be reasonable and valid as applied to non-indigent candidates. Cf. *Boddie v. Connecticut*, 401 U.S. 371; *Harper v. Virginia Board of Elections*, 383 U.S. 663.

If a state's objective is to assure that only *bona fide* candidates, with at least a modicum of public support, are on the ballot, an obvious–and constitutionally justifiable–means of furthering that interest would be to require all candidates to show such support by filing nominating petitions signed by a reasonable number or percentage of eligible voters. Cf. *Jenness v. Fortson*, 403 U.S. 431, 442. California's filing-fee requirement, however, makes access to the ballot depend on how much money a candidate and his supporters possess. The financial burdens of running for public office are heavy enough without adding the further requirement that an impoverished candidate pay a tithe to the state as an absolute condition to getting his name on the ballot.

Appellant suggests that even a poor candidate should be able to raise the money to pay the fee by "passing the hat" among his supporters. In practical effect this would impose a selective discriminatory poll tax on some voters as a condition to being able to cast votes for the candidate of their choice, solely because of his inability to pay the required fee.

## ARGUMENT

### CALIFORNIA'S EXCLUSION OF INDIGENT CANDIDATES FROM THE BALLOT, SOLELY BECAUSE OF THEIR INABILITY TO PAY THE REQUIRED FILING FEES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The court below correctly held that this case is governed by the unanimous decision last Term in *Bullock v. Carter*, 405 U.S. 134. The basic flaws in the Texas filing-fee system which led this Court to hold it

unconstitutional are also to be found in the California system.

We emphasize, at the outset, that under both systems there is simply no way that voters can have their candidate considered for the party nomination if he cannot post the required fee. Under neither system is any alternative means provided whereby an indigent candidate can get on the ballot. We submit that this case, like *Bullock*, boils down to a clear and simple proposition: No filing-fee requirement, regardless of its reasonableness, size, purpose, method of computation, or validity in relation to other candidates able to pay the fees, can survive judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment where its effect is to keep an indigent candidate off the ballot and thus deprive his supporters of any opportunity to vote for him. Whatever a state's legitimate interest in regulating the ballot or defraying election costs, it cannot exclude poor people, solely because of their poverty, from participating in the political processes as candidates or voters.

### A. Comparison of California and Texas Filing-Fee Systems

Under the provisions of California's Elections Code, an otherwise eligible candidate who cannot afford to pay the filing fee fixed by statute is absolutely barred from the ballot, both at the primary and general elections. Write-in candidates and independent candidate nominees must also pay the statutory fees (see statutes cited in Appellant's brief, p. 5). In short, there is no way under California law for an indigent candidate to get on the ballot, no matter how serious his candidacy or how broad his support among the voters, if he is unable to pay the fee.

In contrast, under Texas law the filing-fee requirement was "applicable only to party primaries, and * * * a candidate can gain a place on the ballot in the general election without payment of fees by submitting a proper application accompanied by a voter petition." *Bullock, supra,* at 146. However, this Court rejected the argument that the limitation of the Texas filing-fee requirement to primary elections saved it from constitutional condemnation (*id.*, at 146-47); and it is noted here only to indicate that, in this respect, the California system is less defensible than that of Texas.

The basic contention of the Attorney General of California is that his state's filing-fee system differs from that of Texas in the "reasonable amount" of the fees, in the method of computation, and in its purpose of defraying, not all, but only "a reasonable portion of the governmental election costs" (Appellant's brief, p. 5).

In California the candidate filing fees for all offices (federal, state, and local) are fixed by state statute, and generally are equal to a percentage of the first year's salary for the office sought. The fee for candidates for United States Senator, Governor and other state offices, and some county offices, is two percent of the annual salary. Candidates for Representative to Congress (as in the instant case), State Senator or Assemblyman, or for judicial office or district attorney, must pay one percent. No filing fee is required of candidates in the presidential primary, or for offices which pay either no fixed salary or not more than $600 annually. (See statutes set forth in Appellant's brief, pp. 2-4.)

Thus, under the California statutes in effect at the most recent election for office, the required candidate filing fees ranged from $192 for State Assembly, $425

for Congress, $850 for United States Senator, to $982 for Governor[1] (Appellant's brief, p. 5).

In Texas, the filing fees for candidates for most local offices in primary elections were fixed by the party's county executive committee, while the fees required of candidates for state offices were more closely regulated by statute and tended to be appreciably smaller. The fees ranged from $50 to $8,900. *Bullock, supra*, at 137-40. Candidates for statewide offices, such as United States Senator and Governor, paid a fee of $1,000 (*id.*, at 140), while candidates for Congress could be assessed up to 10% of their annual salary (*id.* at 138, note 9).

The Texas system was plainly designed to place all, or almost all, of the burden of financing primary elections on the candidates. (*Bullock, supra*, at 138-39, 147-48.) The California system places only part of that burden on the candidates. The Attorney General of California states in his brief (p. 11, note 1) that the Secretary of State "is budgeted for over one million dollars for election expense of that office in 1972." That figure presumably includes the cost of both primary and general elections. He also states that the "total fees forwarded to [the Secretary of State] from candidates for Representative in Congress, State Senator, or Assemblyman in connection with the 1972 primary was $171,577." (*Ibid.*) We are not informed of the total filing fees paid by candidates for county office, which are retained by the county treasurer under Section 6656 of the California Elections Code (Appellant's brief, p. 4). However, there is no reason to doubt the Attorney General's statement that in California "general tax funds provide the primary source of funds to

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[1] It may be noted that appellee has stated, in his motion to affirm, that he will be a candidate for Governor in 1974.

defray election cost at both the state and local level." (Appellant's brief, p. 11, note 1.) It would appear, therefore, that while filing fees may reimburse the State of California for a substantial portion of the primary election costs, the burden of these costs is not entirely or principally shouldered by the candidates, as was the case under the Texas system.

### B. The Appropriate Standard of Review

This case, like *Bullock*, presents an intertwining of two elements which the Court has considered crucial in judging the validity of state statutes under the Equal Protection Clause of the Fourteenth Amendment: the legislative classification (1) is "highly suspect" (*i.e.*, based on indigency or poverty), and (2) impinges upon "fundamental constitutional rights" (*i.e.*, voting and political association). *Bullock* made no new law in holding (405 U.S. at 144) that such a statutory classification "must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." See, *e.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Williams v. Rhodes*, 393 U.S. 23, 31; *McDonald v. Board of Election*, 394 U.S. 802, 807; *Shapiro v. Thompson*, 394 U.S. 618, 638; *Dunn v. Blumstein*, 405 U.S. 330, 335; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73; *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 376; *Griffin v. Illinois*, 351 U.S. 12. We think it clear that the *Bullock* standard of review is equally applicable here.

However, even if the traditional "rational basis" test applies, the California filing-fee system is invalid. As Mr. Justice Powell stated for the Court in *Weber*, *supra*, at 172-73:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. * * * Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, * * *. The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate interest does the classification promote? What fundamental personal rights might the classification endanger?

Our basic submission to the Court is that, whether judicial scrutiny is "close" or otherwise, California has plainly imposed a *de facto* classification excluding poor candidates from the ballot solely because of their poverty or indigency; such exclusion promotes no legitimate state interest, "compelling" or otherwise, and denies poor candidates and their supporters the fundamental rights of voting and political association. Under a system, like California's, where payment of the required fee is an absolute condition to running for office, "the state has made failure to meet the condition a *disqualification from holding public office.*"[2]

We proceed from the basic premise that "the political franchise of voting" is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*,

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[2]Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. Pa. L. Rev. 109, 117 (1971; emphasis in original). The various state filing-fee statutes are compiled in that comment at 136-41; see also Annotation, 89 A.L.R. 2d 864 (1963).

118 U.S. 356, 370. The right to vote in federal elections is conferred by Art. I, §2 of the Constitution. *United States v. Classic*, 313 U.S. 299, 314-15; *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665. That right as well as the right to vote in state elections–whether or not implicit in the Fourteenth Amendment–includes the right to cast one's vote effectively. *Reynolds v. Sims*, 377 U.S. 533, 565; *Williams v. Rhodes*, 393 U.S. 23, 30. "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336. "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. * * * [A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Harper, supra*, at 665, 666. In short, as the Court held in *Bullock, supra*, at 143-44, the right to vote is the right to cast a ballot for candidates of one's own choosing, and such exercise of the franchise may not be conditioned upon payment of a fee or be denied to some voters because they are less affluent than others.

For that reason, which is equally pertinent here, the Court in *Bullock* held that the "more rigid standard of review," requiring the state to make "a showing of necessity" which must be "closely scrutinized," was applicable to the Texas filing-fee system (405 U.S. at 142, 144, 147). Such "close scrutiny" and a "showing of necessity" were held appropriate in *Bullock* because "the Texas filing-fee system has a real and appreciable impact on the exercise of the franchise, and because this impact

is related to the resources of the voters supporting a particular candidate." (405 U.S. at 144.) The Court pointed out that the Texas system substantially limited voters in their choice of candidates; that "this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system;" and that "endemic to the system" was a "disparity in voting power based on wealth" (*ibid.*).

The same observations may be made of the California system. While the range of fees is not so great, and the fees for some offices not so large, the fees required by the California statutes are more than nominal or minimal, and they produce a similar "disparity in voting power based on wealth." The costs of campaigning for elective public office are notoriously high,[3] and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $425 or $982 filing fee paid to the state may make the difference between a candidacy which is viable and one which has no chance at all. Because the impact on exercise of the franchise is so "real and appreciable," and so "related to the resources of the voters supporting a particular candidate," the "showing of necessity" test of *Bullock* is equally applicable here.

In any event, as we argue below, even if the traditional, less stringent "rational basis" standard were used here,

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[3]See materials collected in Comment, *Advertising in Political Campaigns*, 60 Calif. L. Rev. 1371, 1384-86 (1972); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U. L. Rev. 900 (1971); Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359 (1972).

the California system would still be found wanting. As the Court stated in *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95, "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." In another case last Term where the Court applied the traditional test to strike down a state classification under the Equal Protection Clause, *Reed v. Reed*, 404 U.S. 71, 76, it quoted with approval the formulation in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Similarly, in *Weber v. Aetna Casualty & Surety Co.*, *supra*, at 174, a statutory classification was struck down because the Court could find "no significant relationship" to the legitimate legislative purposes. Cf. *James v. Strange*, 407 U.S. 128, 140, where the Court last Term found insufficient justification for a classification between indigents and other judgment debtors; *Eisenstadt v. Baird*, 405 U.S. 438, 447-50; *Tate v. Short*, 401 U.S. 395; *Williams v. Illinois*, 399 U.S. 235.

Thus, even under the traditional test, a legislative classification is justifiable under the Equal Protection Clause only if it furthers, or has a discernible substantial or significant relationship to, a legitimate state interest or purpose.

### C. The Rationale of *Bullock* Is Equally Applicable Here

From a constitutional standpoint, the similarities in the Texas and California systems, as applied to indigent candidates, clearly transcend the minor differences between them. Under both systems (1) ability to pay the required fees is an absolute condition to being on the ballot; (2) indigent candidates are provided with no alternative means of access to the ballot; and (3) supporters of a candidate who cannot post the fee are deprived of any opportunity to vote for him.

Both systems have the same impact on indigent candidates and their supporters, and produce the same denial of equal access to the ballot, and of the right to cast an effective vote. To an indigent candidate, no matter how serious or *bona fide* his candidacy, a $425 filing fee which he is too poor to pay[4] excludes him as absolutely from the ballot as an $8,900 fee. It has the same exclusionary effect on his supporters in depriving them of the opportunity to vote for the candidate of their choice.

The Chief Justice's opinion for the Court in *Bullock* emphasized that "nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." (405 U.S. at 149.) Relying upon the Court's careful disclaimer, appellant here argues that, in contrast to the magnitude of the

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[4]The standards for determining indigency are presumably the same as those applicable to federal *in forma pauperis* proceedings. See *Adkins v. DuPont Co.*, 335 U.S. 331. In respect to the latter, one need not be "absolutely destitute to enjoy the benefit of the statute" (*id.* at 339).

Texas fees involved in *Bullock*, the "California fees are specified by statute in a reasonable amount" (Brief, p. 7).

The test of "reasonableness" under the Equal Protection Clause, however, is distorted by any requirement that this Court make a subjective judgment in the abstract whether a particular filing fee is or is not "excessive" in amount. The question is, "reasonable" or "excessive" in relation to what? Whether a challenged state action is judged under the traditional or a more stringent standard of review, the focus of inquiry under the Equal Protection Clause is the relationship of the classification to the state interest sought thereby to be served.

In *Bullock*, and in *Jenness v. Fortson*, 403 U.S. 431, 442, the Court recognized that "a State has a legitimate interest in regulating the number of candidates on the ballot. [citations omitted] In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. * * * Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." (*Bullock, supra*, at 145) But, as the Court went on to say, "even under conventional standards of review, a State cannot achieve its objective by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation." (*Ibid.*)

If the object of a filing-fee requirement is to include on the ballot only serious or *bona fide* candidates, and to weed out fraudulent or spurious candidates, it "is

extraordinarily ill-fitted to that goal." (*Bullock, supra*, at 146.) Because a candidate's seriousness cannot be measured by the size of his purse, the classification excludes both too much and too little. A rich man with only a few supporters, and whose only purpose is publicity or self-aggrandizement, can get on the ballot simply by reaching into his pocket.[5] A poor man, backed by many voters equally impoverished, who seeks public office in a serious effort to reform the welfare laws, or eliminate poverty, cannot get on the ballot solely because he lacks the money to pay the fee. California's filing-fee system neither excludes the fraudulent but affluent candidate from the ballot, nor permits the honest but poor candidate to gain a place on it. So misdirected a means of "protecting the integrity of the ballot" satisfies not even the most lenient standard of review under the Equal Protection Clause. Because fundamental rights are involved, "the Constitution simply requires the state to take better aim." Comment, *The Constitutionality of Qualifying Fees for Political Candidates*, 120 U. Pa. L. Rev. 109, 128 (1971). Cf. *Turner v. Fouche*, 396 U.S. 346, 363.

Other means to vindicate a state's legitimate interest in regulating the ballot are easily available. In *Jenness v. Fortson*, 403 U.S. 431, where no appeal had been taken from that part of the lower court's order invalidating the state's filing-fee system, this Court upheld a Georgia law requiring an independent candidate to have nominating petitions signed by at least five percent of the eligible voters in order to get his name on the ballot. The state, the Court held, may require "some preliminary showing

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[5]California's Elections Code also requires the filing of sponsor certificates (not less than 40 nor more than 60 for Representatives in Congress, §§6494-6495).

of a significant modicum of support" as a condition to placing a candidate on the ballot (403 U.S. at 442). As *Jenness v. Fortson* demonstrates, the Fourteenth Amendment poses no real obstacle to the states in pursuing the objective of confining the ballot to serious candidates. But the Equal Protection Clause does preclude the use of a test of financial means or property qualifications in determining which candidates are entitled to a place on the ballot.

For what is at stake, in judging a candidates' filing-fee requirement, is a *de facto* discrimination against the poor, infringing the fundamental constitutional rights of voting and political association.[6] *Bullock, supra; Harper v. Virginia Board of Elections*, 383 U.S. 663, 670; *Williams v. Rhodes*, 393 U.S. 23, 31. Thus, an indigent candidate for elective public office, who is otherwise qualified, is entitled to access to the ballot if he files an affidavit of poverty, as in the instant case, where the state provides him with no other means of getting on the ballot. Where a nominating petition signed by a specified number or percentage of voters is required by a state, it should be required of all prospective candidates and not merely those too poor to pay filing fees. For otherwise there would be an invidious discrimination favoring affluent candidates whose payment of the fees is no assurance either of their seriousness or any degree of voter support. See Note, *The Constitutionality of Candidate Filing Fees*, 70 Mich. L. Rev. 558, 585 (1972).

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[6] A candidate or political party adversely affected thereby has standing to assert denial of these constitutional rights. *Williams v. Rhodes, supra; Bullock, supra;* cf. *Eisenstadt v. Baird*, 405 U.S. 438, 443-46; *Griswold v. Connecticut*, 381 U.S. 479, 481; *NAACP v. Alabama*, 357 U.S. 449. Appellee brought the instant case both as a candidate and voter (Appendix, p. 4).

**D. The Asserted Justification for California's Exclusion from the Ballot of Indigent Candidates Unable to Pay the Required Fees Is Inadequate.**

The Attorney General of California seeks to justify its filing-fee system as a reasonable means for reimbursing the state for "a small portion of the total election costs." (Brief, p. 13) As previously indicated (*supra*, p. 7-9) it is not clear how large or small a portion of the total cost of conducting primary elections in California is borne by candidates' filing fees. In any event, *Bullock* holds that the cost of conducting such elections, like general elections, may not "be shifted away from the taxpayers generally," since it is a governmental function which should be "supported from general revenues." (405 U.S. at 148.) In so holding, the Court noted that a state which "has, as a matter of legislative choice, directed that party primaries be held * * * has presumably chosen this course more to benefit the voters than the candidates." (*Ibid.*)

The plain implication of footnote 29 in the *Bullock* opinion (p. 148) is that the only kind of filing fee which might pass constitutional muster is one approximating "the cost of processing a candidate's application for a place on the ballot." Such filing fees would be the same for all candidates on the ballot, regardless of the office sought, since the processing costs would be the same. There would be no difference in fees, as under the California and Texas systems, depending on the salary of the office sought. In sharp contrast, the filing fees here involved are in the nature of a tithe that the state exacts from candidates, bearing no relation either to the costs of the election or to the costs of "filing" or processing their applications.

A true "filing fee", such as described in *Bullock's* footnote 29, would necessarily be small, and in practical effect would be a barrier to very few, if any, *bona fide* candidates. Nevertheless, as a matter of constitutional principle, even such a $5 or $10 requirement, assuming its validity as applied to non-indigent candidates, could not be enforced to exclude from the ballot an otherwise qualified candidate who is so poor that he cannot pay the fee. Cf. *Boddie v. Connecticut*, 401 U.S. 371; *Harper v. Virginia Board of Elections*, 383 U.S. 663; *Griffin v. Illinois*, 351 U.S. 12.

The Attorney General states in his brief (p. 12):

> "Clearly, not all interest groups can have a hand-picked candidate on the ballot."

Under the California system, any interest group *can* have a hand-picked candidate on the ballot so long as he, or they, can afford to pay the filing fee. The only group which is excluded are those too poor to finance a campaign which has enough funds to pay the fee required by the state.

The Attorney General states (p. 12):

> "The candidate filing fees actually developed from a political reform movement with the premise that reasoned choice was enhanced by reducing the number of choices to be made."

This premise comports with the Equal Protection Clause only if the reduction of candidates is not made on the basis of race, poverty, sex, color of hair, or other arbitrary classification.

The Attorney General states (p. 13):

> "It is reasonable to exclude some aspiring candidates from the ballot."

Again, we would agree, provided the exclusion is not based on a financial means test or some other criterion forbidden by the Constitution. It is reasonable to exclude aspiring candidates who have been convicted of accepting bribes or graft while previously in office. See 18 U.S.C. 201(e), 203. But it is not reasonable to exclude aspiring candidates because of their poverty. As Judge Thornberry has said, "It is no answer to proclaim that those candidates without substantial backing cannot seriously hope to win. The seriousness and legitimacy of a political effort is not to be measured by the bullion with which it is bulwarked. Though modern politics may dictate that low budgets do not win elections, it cannot be doubted that those with low budgets are entitled to try." *Carter v. Wischkaemper*, 321 F. Supp. 1358, 1364 (N.D. Tex.) (concurring opinion).

Finally, the Attorney General states (p. 13):

> "If 425 voters believe in a candidate, $1 per voter will place their candidate on the ballot seeking the party nomination for Representative in Congress. Viewed in that context, the candidate's lack of personal resources is not a significant let alone a critical factor."

To require a group of voters to pay the filing fee of an indigent candidate whom they support is, in practical terms, to impose a selective, discriminatory poll tax on such voters. As this Court held in *Williams v. Rhodes*, 393 U.S. 23, 30, a state may not burden "the rights of individuals to associate for the advancement of political beliefs, and the rights of qualified voters, regardless of political persuasion, to cast their votes effectively."

Imposing a financial cost, no matter how small, on voters in order to exercise the right to cast a vote for the candidate of their choice, simply because of his poverty,

cannot be constitutionally justified. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668. "To the extent that the [Texas] system requires candidates to rely on contributions from voters in order to pay the assessments, * * * it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor. * * * [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock, supra*, at 144.

It is an unfortunate fact of American political life that, of all the democracies, the United States consistently has the lowest voter participation in elections. Less than 55% of the potentially eligible voters cast ballots in the recent Presidental election. But for all elections, local as well as national, apathy is especially high among the poor. "There is a direct correlation between income and political participation. The poor do not vote in large numbers. * * * [The] larger need is to enrich the lives and widen the horizons of the poor and thereby raise their stake in citizenship."[7]

Candidate filing-fees limit participation of the poor in the political processes, and thereby reduce their stake in citizenship.[8] The provisions of California's Elections Code requiring such fees, absolutely excluding an indigent candidate from the ballot and denying his

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[7]Editorial, "The Voting Mystery," N.Y. *Times*, Dec. 4, 1972, p. 38.

[8]On the use of filing-fees as a device for preventing blacks from running for public office, see *Political Participation*, Report of the U.S. Commission on Civil Rights (1968), pp. 43-44.

supporters any opportunity to vote for the candidate of their choice, constitute a discriminatory classification which impinges on fundamental constitutional rights, is justified by no legitimate state interest, compelling or otherwise, and cannot withstand judicial scrutiny under the Equal Protection Clause.[9]

## CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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December 1972

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[9] Although not attacked below on that ground, these provisions may also be unconstitutional as adding qualifications for election to Congress not found in Article I, section 2 of the Constitution. See Note, *The Constitutionality of Candidate Filing Fees*, 70 Mich. L. Rev. 558, 565 (1972). Cf. *Powell v. McCormack*, 395 U.S. 486.

IN THE

# Supreme Court of the United States

**No. 71-1583**

OCTOBER TERM, 1972

EDMUND G. BROWN, JR., Secretary of State of the State of California,

*Appellant,*

—v.—

RAYMOND G. CHOTE,

*Appellee.*

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

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## TABLE OF CONTENTS



### TABLE OF CITATIONS

*Cases:*

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## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, *AMICI CURIAE*

### Interest of *Amicus Curiae*[1]

The American Civil Liberties Union is a nation-wide, non-partisan organization with over 180,000 members in the United States. Its affiliates in California are the ACLU of Southern California and the ACLU of Northern California. The ACLU is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-two year existence, the ACLU has been concerned with both the integrity of the judicial process and the protection of fourteenth amendment rights from unlawful actions of state officials.

This case presents significant issues concerning the rights of poor persons to use elections and the electoral process

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and perhaps to elect representatives who may help end that condition of poverty.

On the issues represented as to the scope of the substantive protections of the 14th amendment, we associate with the ably presented positions of respondent. Our sole purpose is to suggest several additional considerations to guide the Court.

## Summary of Argument

The right to participate in the electoral processes, both as a voter and as a candidate, is a fundamental right protected by the Constitution of the United States.

The California Elections Code prevents poor persons from seeking office solely on the basis of wealth. There are no provisions for alternatives to paying filing fees. This requirement prevents a recognizable group of persons from exercising their fundamental right to seek political office solely because of their economic condition.

This Court has held in a number of cases that poor persons cannot be discriminated against solely because of poverty. The lower Court declared California's filing fees unconstitutional based on this Court's decision in *Bullock* v. *Carter* (1972), 405 U.S. 134, which extended the equal protections provisions of the 14th Amendment to the basic and fundamental right to access to the electoral process.

Appellant challenges this interpretation of *Bullock*. Appellant argues that only the reasonableness of the filing fees should be tested; that the test applied should be the "rational basis" test rather than the Court's stricter "com-

pelling state interest" test. To accept Appellant's arguments are to apply a less rigorous test to the political right of access to the political process than to the same poor person's right of access to the Courts for divorces and bankruptcies. The right of access to electoral processes is a basic and fundamental right which requires the application of the stricter "compelling state interest" test.

All of the state's purposes to be accomplished by these filing fees as set forth by Appellant can be achieved by other means without the necessity of depriving poor persons of their right to seek public office. They are legitimate state interests, but the means used to achieve them are neither necessary nor compelling.

## ARGUMENT

**California's filing fee requirement denies poor persons the right to seek public office solely because of their economic station, and deprives poor people of equal protection of the laws as guaranteed by the 14th Amendment.**

### A. *The right to participate in the electoral process is a fundamental right.*

The right to vote is one of the most precious and important rights available to people in a democracy, and as such is guaranteed by the United States Constitution. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966). The Courts have consistently found that the right to vote is included within the category of rights deemed fundamental and necessary. E.g., *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); *Reynolds* v. *Sims,* 377 U.S.

533 (1964); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Burrey* v. *Embarcadero Municipal Improvement District,* 5 C.3d 671, 97 Cal. Rptr. 203 (1971).

An important corollary is the right to seek public office. Without meaningful choices of candidates, the right to vote becomes a mere formality. Numerous courts have recognized that this is a fundamental right. *Wong* v. *Mihaly,* 332 F. Supp. 165 (ND Calif. 1971); *Thomas* v. *Mims,* 317 F. Supp. 179 (S.D. Ala. 1970); *Jenness* v. *Little,* 306 F. Supp. 925 (ND Ga. 1969); *Zapata* v. *Davidson,* 24 CA 3d 823; *Fisher* v. *Taylor,* 196 S.W.2d 217 (S. Ct. Ark. 1946); *Zeilenga* v. *Nelson,* 4 Cal. 3d 716 (1971); *Camara* v. *Mellon,* 4 Cal. 3d 714 (1971); *Georgia Socialist Workers Party* v. *Fortson,* 315 F. Supp. 1035 (ND Ga. 1970). See also *State* v. *Wilson,* 150 S.E.2d 592 (S. Ct. of App. W. Va. 1966); *Kautenburger* v. *Jackson,* 333 P.2d 293 (S. Ct. Ariz. 1958); *Williams* v. *Rhodes,* 393 U.S. 30 (1969).

In *Bullock* v. *Carter,* 405 U.S. 134, this Court indicated that it had not theretofore attached the same fundamental status to candidacies as to voting. But, at page 143, the Court said: "However, the rights of voters and the rights of candidates do not lend themselves to meet separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

**B. *Fundamental rights cannot be denied to poor persons solely because of their economic station.***

Once it is determined that the right to be a candidate is a fundamental right, regulations which deny access to public office to a chronically disadvantaged group constitute discrimination and work as a denial of the equal protection of the laws. Filing fees which bear no reasonable relation-

ship to the office being sought or the person's qualification therefore constitute a legislative guarantee that a politically voiceless and invisible minority remain in that disadvantaged condition. But even if such filing fees bore a resemblance to reasonableness, if there are no provisions for that group which cannot afford even such "reasonable" fees, there is a denial of equal protection. Denied access to seek public office, they are deprived of the ability to use elections and electoral processes as a means of drawing the public's attention to their plight, to the causes which create poverty and the problems that accompany them, and thereby perhaps to solutions. *Hobson* v. *Hansen,* 269 F. Supp. 401 (D.D.C. 1967), *aff'd as modified sub nom. Smuck* v. *Hobson,* 408 F.2d 175 (D.C. Cir. 1969).

It should be axiomatic that the State cannot prevent candidates from running for office solely because they cannot afford a filing fee. And some cases have so held. *Zapata* v. *Davidson,* 24 CA 3d 823 (1972); *Wong* v. *Mihaly,* 332 F. Supp. 165 (ND Calif. 1971); *Jenness* v. *Little, supra; Thomas* v. *Mims, supra; State* v. *Drexel,* 105 N.W. 175 (Neb. 1905).

In *Thomas* v. *Mims, supra,* a United States District Court invalidated an Alabama statute requiring a registration fee of 2% of the annual salary for a municipal office, similar to that involved in the instant case. The court affirmed the right to vote and to seek political office as fundamental rights entitled to the protection of the equal protection clause of the 14th amendment.

Three cases including the instant case have been decided in California affirming the right to file for political office without the payment of fees. In *Wong* v. *Mihaly, supra,* municipal filing fees identical to those in question here were

ruled invalid as to poor people. Judge Wollenberg discussed the problem of the serious candidates: "The proposition that every serious candidate will be able to pay the fee required cannot be accepted without question.... There is, in fact, much to suggest that money and seriousness of candidacy are not always to be found in the same office seeker. On the other hand, it is clear beyond question here that the man who cannot pay, no matter how serious he is, cannot place his name in nomination."

In the case of *Zapata* v. *Davidson, supra,* a California Appellate Court ruled that filing fees (under consideration in the instant case) were unconstitutional as applied to a poor candidate.

*Bullock, supra,* which Appellant would have this Court narrow, involved a Texas system of election fees which were in some instances much higher than California's, but which were also in instances much lower. The one major feature which both systems have in common is that neither State provides alternatives to paying the filing fees in order to qualify for election. As this Court noted in *Bullock* at page 137, "payment of the filing fee is an absolute prerequisite to a candidate's participation in a primary election. There is no alternative procedure by which a potential candidate who is unable to pay the fee can get on the primary ballot by way of petitioning voters, and write-in votes are not permitted in primary elections for public office. Any person who is willing and able to pay the filing fee and who meets the basic eligibility requirements for holding the office sought can run in a primary" (footnotes omitted).

The Court at page 149 also said: "It must be emphasized that nothing herein is intended to cast doubt on the validity

of reasonable candidate filing fees or licensing fees in other contexts. By requiring candidates to shoulder the costs of conducting primary elections through filing fees *and* by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system which utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice" (emphasis added).

This describes the situation in California to a tee. Even if a poor person chose to run a write-in campaign, he or she would be required to pay the filing fees before the votes would be counted under Elections Code §6555.[2]

By focusing upon the factor of one's wealth, the California Code results in blatant, invidious and harmful discrimination upon indigent but otherwise qualified persons who seek elective office. This violates the requirements of equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States. While the State may determine voter qualifications and the manner of elections, it must do so in a manner consistent with the equal protection clause.

At a time when the State and Federal Courts have been steadily broadening the equal protection clause of the 14th

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[2] §6555.

"When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election."

Amendment to insure that poor people are not deprived of the benefits of this society solely because of their lack of wealth, Appellant would have this Court refuse to extend that protection to one of the most important and fundamental rights available to people.

Persons cannot be discriminated against because of poverty. *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (transcripts); *Boddie* v. *Connecticut*, 401 U.S. 388 (1971) (divorce); *Harper* v. *Virginia Board of Elections, supra* (poll tax); *Tate* v. *Short*, 401 U.S. 395 (1970) (parking fines); *In re Kraus*, 331 F. Supp. 1207 (1971) (bankruptcy).

In California, the courts have been cognizant of the principle that persons cannot be discriminated against solely because of the lack of wealth. *In re Fry*, 19 C.A. 3d 177 (1971). They have been zealous in protecting the rights of the poor.

In *Ferguson* v. *Keays*, 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50.00 fee for filing a record on appeal despite the argument that filing fees defray the cost of courts and discourage unnecessary litigation, the same argument advanced by Appellant.

The California Supreme Court has also defined classification based upon wealth as a violation of the equal protection clause in *Serrano* v. *Priest*, 5 C.3d 584, 96 Cal. Rptr. 601 (1971). At page 597, the Court said: "In recent years, the United States Supreme Court has demonstrated a marked antipathy toward legislative classifications which discriminate on the basis of certain 'suspect' personal characteristics. One factor which has repeatedly come under close scrutiny of the high court is wealth. 'Lines

drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored.'"

In *Burrey* v. *Embarcadero Municipal Improvement District,* 5 C.3d 671, 97 Cal. Rptr. 203 (1971), the California Supreme Court declared unconstitutional the denial of voting rights to non-property holders in the election of directors to a municipal district. The Court held at page 679 that a legislative classification which discriminates on the basis of wealth "can be sustained, if at all, only by the most compelling of state interests."

Finally as indicated above, a California Appellate Court in *Zapata* v. *Davidson, supra,* has ruled that the same filing fees in question in the instant case were unconstitutional as to plaintiff who was a poor person.

The rights which the Courts have protected in the foregoing cases range from use of the Courts for appeals, divorces, bankruptcy, to voting rights, abolishing of poll taxes. Poor persons may now appeal without paying fees, obtain divorces, and go through bankruptcy. Surely the right to run for office is at least as important as those rights.

**C. *The "rational basis" test is not applicable here.***

This Court has developed two standards to measure constitutionality within the framework of equal protection of the laws. Under the general standard, sometimes called the "rational basis" test, the Court examines different treatment to see whether the difference has any rational relationship to a legitimate public policy. E.g., *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *McGowan* v. *Maryland,* 366 U.S. 420 (1961); *Morey* v. *Doud,* 354 U.S. 457 (1957). On the other hand, in cases involving "suspect classifications"

touching upon "fundamental interests and rights," the Court has invoked a much stricter standard. In such cases, the classification is considered invidious, and government officials are required to justify such differences by a "compelling" interest. E.g., *Shapiro* v. *Thompson*, 394 U.S. 613 (1969); *Levy* v. *Louisiana, supra; Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Reynolds* v. *Sims, supra; Skinner* v. *Oklahoma*, 316 U.S. 535 (1942).

In *Williams* v. *Rhodes, supra*, this Court devised a test which included as important elements: (1) the facts and circumstances behind the law, (2) the interest which the state claims to be protecting, and (3) the interests of those who are disadvantaged by the classification.

Appellant urges that the standard to be used in determining the constitutionality of the state's elections code should be the general standard. But to apply the general standard to the question of access to the electoral process is to ignore the whole body of case law cited heretofore establishing the right to seek office as a fundamental and basic right.

Appellant urges that the state has legitimate interests which are "reasonably necessary." And in defense of the California Elections Code cites (pp. 14-15) extensively from *Socialist Party* v. *Uhl*, 155 C. 776, 103 P. 181 (1909). However, Appellant did not cite extensively enough because that Court at pages 790 and 791 went on to discuss the California fees, then $10.00 to $50.00, and stated that they were "fixed at an amount that will impose no hardship upon any other person for whom there should be any desire to vote." The Court then discussed decisions in other states, and pointed out at page 791 that the fees which had been so disapproved called for "the payment of a fee

based on the emoluments of the office to which the candidate aspires, and, in the second case, the fee was made to correspond with the importance of the office from the standpoint of dignity and influence, as well as from the standpoint of emolument." Perhaps if that Court had been faced with California's present fee system of 2% of the salaries or "emoluments" of the office, the decision would have been different. Indeed, the later California cases which we have above discussed make the present standing of the case dubious.

Appellant argues that the state's reasons for the fees are to avoid an indiscriminate scramble for office, limiting the size of the ballot to avoid voter confusion and fragmentation of votes, and to defray at least a portion of the cost of elections. In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), this Court indicated that the collection of revenue was a legitimate interest of the state. However, to qualify as a compelling state interest, the law must be "necessary and not merely rationally related to the accomplishment of a permissible state policy." To the same effect is *Carter* v. *Wischkaemper*, 321 F. Supp. 1358 (N.D. Tex. 1970).

The California Legislature included its intentions in Elections Code §6556 "that the funds deposited in the General Fund pursuant to this section will be used to support the State Commission on Voting Machines and Vote Tabulating Devices to the extent that appropriations are made in the Budget Act from year to year." However, no appropriations have ever been made, and it is obvious that the fees are a mere revenue raising device. Appellant also indicates this as one of the stated objectives.

Filing fees as a means of raising revenue are notoriously deficient, weighing the small amount of revenue available to the state as opposed to the very heavy burdens placed upon the individuals who wish to exercise their constitutionally protected rights to vote and run for office. At least 18 states, including Colorado, Indiana, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee and Vermont, have no filing fees. If these states, including some of the largest in the country, do not find it even "necessary" to use elections to collect revenue, it can hardly be argued that California is compelled to use this method.

Likewise with the other stated objections; they are not so compelling or necessary that the rights of poor persons to participate in the electoral process should be compromised. All of these stated objectives can be accomplished through other means without depriving poor persons of their constitutional rights.

## CONCLUSION

**The judgment should be affirmed.**

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

Syllabus

## BROWN, SECRETARY OF STATE OF CALIFORNIA *v.* CHOTE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 71-1583. Argued February 22, 1973—Decided May 7, 1973

Appellee, who sought to run for Congress but asserted that he was unable to pay California's statutory filing fee, filed a class action in District Court, challenging the constitutionality of the filing-fee statutes. In the face of an impending filing deadline, the District Court granted appellee's motion for a preliminary injunction. *Held:* Given the possibility that appellee would prevail on the merits and the fact that appellee's opportunity to be a candidate would have been foreclosed absent interim relief, the District Court did not abuse its discretion in granting a preliminary injunction. Pp. 4–6.

342 F. Supp. 1353, affirmed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

# SUPREME COURT OF THE UNITED STATES

No. 71-1583

Edmund G. Brown, Jr., Secretary of State of California, Appellant, *v.* Raymond G. Chote.

On Appeal from the United States District Court for the Northern District of California.

[May 7, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case arises under 28 U. S. C. § 1253 on direct appeal from a three-judge district court in the Northern District of California. The court was convened pursuant to 28 U. S. C. § 2281 when appellee called into question the constitutionality of those provisions of the California Elections Code which require candidates in a primary election to pay a filing fee prior to having their names listed on the primary ballot. Calif. Elections Code §§ 6552 and 6553. Under these provisions, candidates for the federal House of Representatives must pay $425 (1% of the annual salary of the office); candidates for the federal Senate must pay $850 (2% of the salary of the office). Those wishing to run for statewide offices must pay similar fees ranging in amount from $192 for State Assemblyman (1% of the annual salary) to $982 for Governor (2% of the annual salary). Other portions of the California Elections Code, not challenged in the present suit, require prospective candidates to file with appropriate state officials a declaration of candidacy and sponsor certificates. Calif. Elections Code §§ 6490–6491, 6494–6495.

Appellee commenced this class action on March 3, 1972. He moved and was granted permission by a single district judge to proceed *in forma pauperis* and as his own attorney. In his complaint, appellee asserted that he wished to become a candidate for the federal House of Representatives from the 17th District of California, and had taken the following steps to place his name in nomination in the June 6, 1972, California primary election. On February 17, 1972, appellee called the Registrar of Voters of Santa Clara County, an official designated by state law to dispense those forms necessary to place a name in nomination. Appellee was purportedly told by the Registrar or a member of his office that he was required to pay $425 in advance in order to secure blank copies of the necessary papers. According to appellee, the Registrar's Office also advised him that the papers would be delivered in exchange for a worthless check.[1]

Appellee proceeded immediately to the Registrar's Office where he presented a personal check for $425 and requested copies of the necessary forms. Across the face of the check, appellee had typed "Written under protest for filing fee."[2] The Registrar issued the requisite papers to appellee and informed him that his check would be forwarded to the California Secretary of State when his com-

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[1] The State denies that such advice was ever communicated to appellee. In an affidavit submitted to the District Court, the Registrar of Voters of Santa Clara County stated that it was the policy of his office not to distribute the required forms to anyone who represented to the Registrar that the check submitted was worthless. The Registrar further stated that, to his knowledge, neither he nor anyone in his office had ever informed appellee that forms would be issued upon presentation of a worthless check.

[2] When the case was argued before the District Court, appellee claimed that he had also told the Registrar or a member of his office that the account on which the check was drawn did not contain sufficient funds to cover it. However, this fact is not alleged in the complaint.

pleted papers were submitted. Subsequently, a Deputy Secretary of State informed appellee that his name would not be placed on the ballot if his check was not honored.[3]

Citing *Bullock* v. *Carter*, 405 U. S. 134 (1972), appellee asserted that California's filing fee system was unconstitutional since it barred indigents, such as himself, from seeking elective office and from voting for the candidate of his or her choice. In addition to requesting declaratory and permanent injunctive relief, appellee moved the District Court to issue a preliminary injunction so as to allow him to participate as a candidate in the upcoming primary. Under state law, the final date on which appellee could submit nominating papers for that primary was March 10, 1972, one week away.

Because of the impending filing deadline, the District Court proceeded quickly to set the case for argument. On March 3, 1972, the same date on which the suit was filed, the single District Judge to whom the case was assigned entered an order requiring appellant to show cause why interlocutory relief should not be granted. The State was given five days in which to respond. It was not until March 7 that the Chief Judge of the Ninth Circuit was notified of the application for a three judge court. On March 8, he designated the judges who were to comprise the panel. On the same day, the court convened and heard oral argument. Because of the speed with which the case had developed, neither the court nor appellee had an opportunity prior to the hearing to consider appellant's return to the order to show cause, the only paper which the State had been able to prepare.

On March 9, 1972, one day after oral argument and one day before the deadline for filing nomination papers,

[3] Appellant submitted to the District Court an affidavit from the Deputy Secretary of State to whom appellee had spoken, disputing appellee's claim that he had been informed that his name would not be placed on the ballot if his check was not honored.

the District Court granted appellee's motion for a preliminary injunction, stating:

> "Since no . . . showing has been made by the state concerning either the necessity, the purpose of the reasonableness of the filing fee statutes in question, we conclude that within the rationale of *Bullock* [v. *Carter*, 405 U. S. 134 (1972)], *plaintiff may prevail on the merits* and that, absent a preliminary injunction, his constitutional right may be irreparably lost." (Emphasis added.)

Under the terms of the preliminary injunction, the State was required to allow appellee and others similarly situated to place their names on the ballot without paying the required fee, so long as they were otherwise eligible for the applicable state or federal office and had deposited with an appropriate state official an affidavit attesting to their indigency.

The State appealed directly to this Court under 28 U. S. C. § 1253. Its Jurisdictional Statement posed two questions:

> "Under the decision of this Court in *Bullock* v. *Carter*, 405 U. S. 134 (1972), when a state statute requiring a candidate's filing fee of one per cent (1%) of the first years salary for the office is challenged on Equal Protection grounds does the 'rational basis' or 'close scrutiny' standard of judicial review apply?
>
> "Do California Election Code sections 6552 and 6553 deny voters or indigent prospective candidates equal protection of the laws?"

Thus, the State of California, for reasons not clear to us in light of the limited record, asked the Court to address itself to the ultimate merits of appellee's constitutional claim, a question which the District Court did not reach.

In the present posture of the case, there is no occasion to consider any issues beyond those addressed by the District Court.

The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the possibility that irreparable injury would have resulted absent interlocutory relief. As the District Court opinion clearly evidences, issuance of the injunction reflected the balance which that court reached in weighing these factors and was not in any sense intended as a final decision as to the constitutionality of the challenged statute. In the exigent circumstances, the grant of extraordinary interim relief was a permissible choice; but on the very limited record before the District Court a decision on the merits would not have been appropriate.

In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion. *State of Alabama* v. *United States*, 279 U. S. 229 (1929); *United States* v. *Corrick*, 298 U. S. 435 (1936); *United Fuel Gas Co.* v. *Public Service Commission of West Virginia*, 278 U. S. 322 (1929); *National Fire Insurance Co. of Hartford* v. *Thompson*, 281 U. S. 331 (1930). In light of the arguments presented by appellee and the fact that appellee's opportunity to be a candidate would have been foreclosed absent some relief, we cannot conclude that the court's action was an abuse of discretion. We therefore affirm the action taken by the District Court in granting interim relief.

In doing so, we intimate no view as to the ultimate merits of appellee's contentions. The record in this case clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments. While

the District Court's swift action is understandable in view of the deadline which it faced, the resulting record was simply insufficient to allow that court to consider fully the grave, far-reaching constitutional questions presented.

The specific deadline which led the District Court to grant equitable relief has now passed.[4] Nothing precludes appellee from seeking a trial on the merits, if he chooses to proceed. The case is therefore remanded to the District Court for further proceedings consistent with this opinion.[5]

*Remanded for further proceedings.*

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[4] Although the June 6 primary election has passed, the question raised is one "capable of repitition, yet evading review." Consequently, the case is not moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911); *Roe* v. *Wade*, No. 70–18, slip opinion, at 10 (1973).

[5] We have granted certiorari in No. 71–6852, *Lubin* v. *Allison*, in order to consider conflicts in holdings regarding the constitutionality of state filing fee statutes.